



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

November 16, 2001

Re: Continued Negotiation of General Water Management Rules
IDAPA Docket No. 37-0313-9701

The Department reviewed the enclosed letters commenting on the July 10, 2001 draft. Copies of the comments are provided for your information.

The department is reviewing the comments and will revise the draft rules as appropriate. Our intent is to have temporary rules in place by April 1, 2002. This will allow a season's experience operating under the rules before promulgating permanent rules for review by the 2003 legislature.

If the department's review indicates that another negotiation meeting is needed and will be useful in finalizing the rules, a meeting date, time, and place will be announced.

Thank you for your cooperation and effort in shaping the rulemaking process. We appreciate your participation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karl J. Dreher', is written over a horizontal line.

Karl J. Dreher
Director

Enc.

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OCT 29 2001

Law Offices

Department of Water Resources

**RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, Chartered**

Ray W. Rigby
Gordon S. Thatcher
G. Rich Andrus
Jerry R. Rigby
Michael S. Kam
Gregory W. Moeller

P.O. Box 250
25 North Second East
Rexburg, ID 83440

Telephone: (208) 356-3633
Fax: (208) 356-0768
E-Mail: Rexlaw@srv.net

October 26, 2001

Karl Dreher, Director
Idaho Department of Water Resources
1301 North Orchard St.
Boise, Idaho 83706

Re: Comments on the Working Draft Text for the Statewide Water Management Rules

Dear Mr. Dreher:

On behalf of the numerous Upper Valley canal companies, irrigation districts and individual water users that our firm represents, we are providing the following comments on the Department's July 10, 2001, draft text of the Statewide Water Management Rules.

COMMENTS

Rule 1.02 - Scope of Administration (Page 1).

Our clients are concerned that the last sentence refers to additional rules without addressing how they will be created. We would suggest the following sentence be added to the end of Rule 1.02: **"Any additional rules must be consistent with the powers and limitations placed on the Department of Water Resources within the Idaho Code and the Constitution of the State of Idaho."**

Rule 10.15 - Definition of Injury (Page 3).

It is our assumption that the phrase "physically and legally available" would encompass the "Futile Call" doctrine. If not, that issue must be addressed.

While we recognize that this definition may represent a good compromise because none of the parties will be completely satisfied, it is complicated by difficulty in proving injury and the definition of waste in Rule 10.29. Simply put, we believe injury is a reduction of one's water right that could result in a compensable consequence.

Nevertheless, we are prepared to accept your proposed definition of injury with one exception. We would propose that the very last sentence of Rule 10.15 be revised so that the word "water" is replaced with the term "beneficial use." As a result of that change, that last sentence of Rule 10.15 should read as follows: **"The extent of injury equals the amount of beneficial use diminished."**

Karl Dreher, Director
October 26, 2001

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Rule 10.21 - Definition of Presumptive Depletion (Page 4).

Rule 10.22 - Definition of Presumptive Injury (Page 4).

Our clients may be able to live with these definitions if there was more clarity about the effect of the presumptions set forth in both Rule 10.21 and Rule 10.22. In order to make clear that these are not irrebutable presumptions, and the standard that would be required in each case, we would suggest that language substantially similar to the following be added at the conclusion of both sections: To be added at the conclusion of Rule 10.21 - **"A depletion presumed herein may be rebutted by substantial evidence and principals of equity."** To be added at the conclusion of Rule 10.22 - **"The injury presumed herein may be rebutted by substantial evidence and by principals of equity."**

Rule 10.23 - Reasonable Pumping Lift (Page 4).

As a matter of drafting, we are concerned about defining the term "reasonable pumping lift" by saying that senior priority ground water owners are protected "against unreasonable lowering of ground water . . ." To define what is "reasonable" by basing it on a standard of what is "unreasonable" causes confusion and ambiguity in the definition.

Rule 10.25 - Definition of Rotation Agreement (Page 5).

**Rule 22.01-.02 - Rotation Agreements: Basis for Use of Water in Excess of
Recorded Right (Page 11).**

After close review, our clients are concerned that the definition contained in proposed Rule 10.25 may be inconsistent with Rule 42.01(c). Rule 42.01(c) indicates that the "instantaneous rate of diversion shall not exceed the authorized rate." The definition in Rule 10.25 appears to be in conflict with that because there is no limitation under the definition of rotation agreement.

Our clients prefer to see rule 42.01(c) modified so that it is consistent with the definition that is acceptable to us in Rule 10.25. Perhaps this could be done by referencing the definition of Rule 10.25 into Rule 42.01(c).

Rule 10.36 - Definition of Waters of the State of Idaho or Public Water (Page 6).

We are concerned that this definition is misleading. Based upon our reading of Idaho Code § 42-221, dealing with natural channels that are not diverted, and other similar references in the Code, we are not convinced that "waters of the State" are synonymous with "public water." We believe the term "waters of the State" is much broader than the term "public water."

Rule 20.06 - Use of Surface Water First (Page 7).

Rule 25.01-.03 - Enforcement of the Use of Surface Water First (Page 12-13).

Our clients firmly believe that the policy set forth in Rule 20.06 and Rule 25.01 is a bad policy and should be removed entirely from the proposed rules.

In the era of the E.S.A. and other environmental concerns, "de-watering" streams first seems counterproductive. Also, diversion effects of ground water withdrawals are normally time delayed and

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time extended. For example, 1 c.f.s. diversion from a stream would diminish the flow in a stream by exactly 1 c.f.s. That same water pumped from a well may not impact the stream flow at all for many days. Then the impacts would range from zero to a maximum less than 1 c.f.s. The 1 c.f.s. impact from the surface diversion for 100 days would impact the stream by 1 c.f.s. for that entire period. A 1 c.f.s. diversion from ground water may not impact the stream at all during the irrigation season, when the demand for surface water is greatest. It may cause a decline in stream flow for the next year by an average of 0.25 c.f.s. Thus the impact on surface rights would actually be reduced by 75% simply by moving the diversion to a well.

If Rules 20.06 and 25.01-.03 are adopted by the Department, the exemptions set forth in Rule 25.03 need to be clarified. The heading for 25.03 says "Existing Uses Exempted." However, the body of the rule indicates that "this rule shall not be applied to require water **users**, . . ." By wording it as such, the practice exempted may only apply to current water users, and not their heirs and successors. If a farming operation has been utilizing this process before the rule was adopted, that farming operation should be allowed to continue such practices in the future. If this was truly intended to be a grandfather clause, it should be consistent with the heading which exempts "**uses**" and not just "**users**".

Rule 20.07 - Reuse of Drainage Water (Page 7).

Proposed Rule 20.07 appears to be inconsistent with Idaho Code § 42-228, which allows wells to be dug to reclaim seepage water. Idaho Code § 42-228 does not contain the same restrictions on use which the proposed Rule 20.07 contains.

Rule 20.09 - Establishment and Use of Presumptive Depletions (Page 8).

Rule 20.10 - Establishment and Use of Presumptive Injury (Page 8).

Creation of presumptions, which tend to have a legally binding effect, are a very serious matter. They greatly impact and potentially change the existing rights of water users. Idaho Department of Water Resources should be diligent in establishing substantial criteria before making any type of presumption. Those criteria should be set forth within the rules.

Rule 41.03 - Regulation of Diversions (Page 15).

Rule 41.06 - Stored Water and Co-Mingled Water (Page 15).

These rules appear to conflict with the language in proposed Rule 20.07 (Reuse of Drainage Water). The language in proposed Rule 20.07 would appear to prohibit co-mingling after this water becomes "public waters." If proposed Rule 20.07 is corrected as indicated above, that should resolve this issue.

Rule 42.01(c) - Enforcement of Diversion Rate and Volume Based Upon Seven Day Average (Page 16).

After carefully considering this controversial issue, our clients believe that enforcement should ultimately be based upon the annual volume of diversion. Except in very limited special circumstances, significant harm can be immediately detected. Satellite technology can also verify whether the water is being used or expanded impermissibly. Pumpers, without weekly reporting who would be subject to these restrictions. Are typically not configured to divert water beyond the licensed rate. Providing total

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diversion volume on a weekly basis would require the collection of massive amounts of data, a very significant amount of paper work, and will likely provide little, if any, information of value. The key determination is not the periodic diversion, but the annual rate of diversion. This rule also could potentially be in conflict with proposed Rule 22 (Rotation Agreements). Presumably, rotation agreements could allow use in excess of the licenced volume for short periods of time if the overall average was consistent with the licenced flow rate and volume.

Rule 44 - Presumption of Innocence.

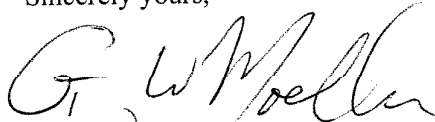
We propose that an additional rate be included, which would read as follows:

Any water user accused of violating any of these rules shall be presumed innocent of any said violation until substantial competent evidence establishes otherwise.

CONCLUSION

Our clients recognize that the proposed rules are the result of much work and revision. We believe this is the best draft of the rules we have seen yet and are encouraged by the work and progress the Department has made. However, there are still some nagging issues, which have been discussed above, that need to be resolved satisfactorily. We appreciate the department's interest in reviewing these comments and will gladly provide additional information, comments, or any other help as requested by the Department in perfecting these proposed Water Management Rules.

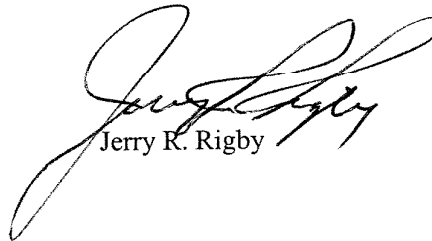
Sincerely yours,



Gregory W. Moeller

GWM:jt

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Jerry R. Rigby

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

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Department of Water Resources

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Idaho Falls
Pocatello

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Bradley J. Dixon
Keasa L. Hollister
Willis C. Moffatt,
1907-1980

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

208 345 2000
800 422 2889
208 385 5384 Fax
www.moffatt.com

October 30, 2001
Via Hand Delivery

Director
Idaho Department of Water Resources
1301 N. Orchard
Boise, ID 83706

Re: Comments to July 10, 2001 Draft Water Management Rules
MTBR&F File No. 18946.13 & 18955.9

Dear Director:

I enclose, on behalf of my clients, Pioneer Irrigation District and Settlers Irrigation District,
Comments to Draft Water Management Rules.

Thank you, in advance, for your attention to this matter. Please do not hesitate to contact my
office if you have any questions.

Very truly yours,


Scott L. Campbell

SLC/dll

Enclosure

cc: Pioneer Irrigation District
Settlers Irrigation District

COMMENTS TO DRAFT WATER MANAGEMENT RULES

JULY 10, 2001 DRAFT

COMMENTS PRESENTED ON BEHALF OF OF PIONEER IRRIGATION DISTRICT AND SETTLERS IRRIGATION DISTRICT

These comments are provided on behalf of Pioneer Irrigation District and Settlers Irrigation District (collectively "Districts") to the Idaho Department of Water Resources ("Department") draft General Water Management Rules, IDAPA 37.03.13, issued on or about July 10, 2001 ("July 10 Draft"). The Districts previously provided comments to the initial Draft Water Management Rules ("First Draft"). In some instances, the Districts may rely on their previous comments, and whenever the Districts do rely on their previous comments, they will so indicate. In other instances, the Districts will provide new or additional comments.

The Districts appreciate the efforts of the Director and the Department in drafting the Water Management Rules, and intend to participate fully in the negotiated rulemaking in this matter.

I.

OVERARCHING COMMENTS

The Districts remain firm in their position that the prior appropriation doctrine is the law of the State of Idaho. Any potential infringement on that doctrine must be carefully scrutinized.

On a positive note, the Districts' concerns regarding the First Draft's effect on the prior

appropriation doctrine have been alleviated somewhat. Specifically, the Districts are pleased with the language that:

These rules are intended to further implement and apply Idaho law. Nothing in these rules shall be construed to be inconsistent with or limit the application or requirements of Idaho law, including the prior appropriation doctrine as implemented in Idaho law.

(Rule 1.005). The latter part of the language, in particular, mirrors the general provision to which the parties in SRBA Subcase No. 91-00005 have stipulated.

Additional specific comments about the effect of specific rules on the prior appropriation doctrine will be discussed at the appropriate point in these comments.

II.

COMMENTS TO DEFINITIONS

In their comments to the First Draft, the Districts stated that the definitions section of the Draft Rules could be the most critical part of the Draft Rules. The Districts reaffirm that position. It is absolutely imperative that the definitions be clear.

A. “Conjunctive Administration”

The definition now provides that “Conjunctive Administration” (formerly “Management”) is:

The combined administration of water rights from hydraulically connected surface and ground water sources ***under the prior appropriation doctrine as set forth in Idaho law*** recognizing the priorities of the rights, physical characteristics and significance of source connectedness, and the differences in impacts occurring from surface water diversions versus impacts from ground water diversions.

(Draft Rule 10.02) (emphasis added). The Districts agree with the emphasized language.

However, they believe that the remainder of the definition is a qualifier which might serve to diminish the prior appropriation doctrine, notwithstanding the language in Draft Rule 10.04.

Consequently, the Districts recommend the definition end after the words "Idaho law." That should be sufficient.

B. "Elements"

The Districts recognize that the elements set forth in Draft Rule 10.08 are largely those contained in Idaho Code section 42-1409. However, the phrase "maximum quantity of water that may be diverted" as an element of a water right is extremely troubling. Certainly, a water right holder cannot divert and use more than the quantity stated in his water right. But by terming the quantity element of a water right the "maximum quantity," the possibility becomes even more real that a water user will be required to re-prove the amount of water to which he or she is entitled before junior users are curtailed, even if the water right in question has been decreed or recently licensed. The Districts maintain that the element should just be "quantity." The Idaho Code does not provide otherwise.

C. "Expansion"

In the First Draft, "expansion" was defined as "[a]ny increase in one or more of the elements of a water right or an increase beyond the defined beneficial use under a valid water right." The Districts expressed the concern that the definition was too broad, and could operate

to prohibit an increase in the diversion rate with a decrease in the period of use (which would lead to no net increase). The definition is now:

Any increase in one or more of the elements of a water right *that increases the extent of beneficial use defined and authorized under a valid water right.*

(July 10 Draft, Rule 10.10 (emphasis added)). The Districts believe that definition is more accurate, and allows for more flexible use of a water right. Care must be taken to ensure, however, that the phrase “authorized under a valid water right” does not result in debate, during times of shortage, over what use is “authorized.”

D. “Hydraulically Connected Ground and Surface Water”

The definition contained in the July 10 Draft is clearer than the original definition. However, the Districts wonder whether requiring that “changes in water levels within the ground water source affect the amount of water exchanged between the ground water source and the surface water source” in order for ground and surface water to be hydraulically connected is too narrow. It might be better, instead, to change the “and” to “or” between the just-quoted phrase *and the one preceding it*. The definition would then read:

A ground water source and a surface water source physically interconnected such that a portion of the ground water can become surface water, or a portion of the surface water can become ground water, *or* changes in water levels within the ground water source affect the amount of water exchanged between the ground water source and the surface water source...

E. “Idaho Law”

The Districts support this definition. However, it is important to remember that:

While the power to make law lies exclusively within the province of the legislature, “the legislature may constitutionally leave to administrative agencies the selection of the means and the time and place of the execution of the legislative purpose, and to that end may prescribe suitable rules and regulations.” Administrative agencies do this by enacting rules and regulations. *However, while these rules and regulations may be given the “force and effect of law,” they do not rise to the level of statutory law.* Only the legislature can make law.

Mead v. Arnell, 117 Idaho 660, 664, 791 P.2d 410, 414 (1990) (emphasis added) (additional citations omitted). No administrative agency can rewrite the law or expand it beyond the limits contained in the Idaho Constitution and the Idaho Code.

F. “Injury”

This definition is important, particularly if the concept of injury ultimately plays a significant role in determining when curtailment is to occur. The Districts previously expressed detailed concerns regarding the definition of injury, which has not changed significantly for the Districts’ purposes since the First Draft. Therefore, the Districts will re-state their previous comments:

The Districts oppose the definition of injury set forth in the Draft Rules, and disagree that it is an accurate statement of the law as set forth in the Idaho Constitution, the Idaho Code, and as interpreted by the Idaho appellate courts. Once again, it is important to remember that the Idaho Supreme Court held, nearly 20 years ago, that “[p]riority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder.” *Jenkins v. State*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). The *Jenkins* court was considering the injury that would result to junior water right holders if a senior water right holder could return to his or her place in the priority line

if he or she had abandoned or forfeited that senior water right. If injury would result under that circumstance, it seems beyond argument that injury will occur if a senior water right holder does not receive the water to which he or she is entitled under the pertinent water right, while juniors continue uncurtailed.

The Idaho Supreme Court discussed injury in the context of one seeking to appropriate new water under the permit system:

This Court has long held that the State Reclamation Engineer has no right, power or authority to interfere with vested rights or to grant a permit for the appropriation and diversion of the water of a stream where the same has already been diverted and applied to a beneficial use. *Nielson v. Parker*, 19 Idaho 727, 115 P. 488; *Youngs v. Regan*, 20 Idaho 275, 118 P. 499.

A subsequent appropriator attempting to justify his diversion has the burden of providing that it will not injure prior appropriators. *Moe v. Harger*, 10 Idaho 302, 77 P. 645. *Josslyn v. Daly*, 15 Idaho 137, 96 P. 568, *Jackson v. Cowan*, 33 Idaho 525, 196 P. 216; *Silkey v. Tiegs*, 54 Idaho 126, 28 P.2d 1037. In *Josslyn v. Daly*, *supra*, at 15 Idaho 149, 96 P. at 571, this court stated:

“* * * It seems self-evident that to divert water from a stream or its supplies or tributaries must in large measure diminish the volume of water in the main stream, and, where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a priori appropriator, he should, . . . produce ‘clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion.’ The burden is on him to show such facts.”

It is a fundamental concept that under our constitution, water which has already been appropriated is not subject to appropriation by another, unless it has been abandoned by the original appropriator or his successor in interest.

Cantlin v. Carter, 88 Idaho 179, 186-87, 397 P.2d 761, 765-66 (1964).

That case stands for the proposition that protection of prior appropriators should be of paramount importance in the permitting or appropriation process. There is no reason to think that the standard should be any different during day to day administration. Indeed, consistency would demand nothing less. Moreover, prongs two and three of the proposed test for injury contemplate a burden on the part of the senior appropriator to prove a negative. That is contrary to the law. While a senior should not be allowed to waste water, *as that term is used in the Idaho Code and cases interpreting it*, the proposed definition invites microscopic examination into a senior water right holder's irrigation practices, while a much-junior water right holder might continue to merrily divert water.

It is certainly true that under Idaho law, a water right holder is not entitled to waste water under his or her water right. However, "waste" is defined in the Draft Rules as "[t]hat amount of water diverted in excess of the amount of water reasonably needed and actually used for the beneficial use under a water right." (Draft Rule 10.25). The definition of injury, combined with the definition of waste are contrary to Idaho Supreme Court precedent. In a case pitting a junior appropriator against a senior, the Court held:

Under the facts involved in this case, the court's conclusion that the best use of the water was the use made of it by defendant, is immaterial and lends no support to the judgment. *The policy of the law against the waste of irrigation water cannot be misconstrued or misapplied in such a manner as to permit a junior appropriator to take away the water right of a prior appropriator.* So long as the water from the springs and swamps, flowing in its natural channels, would reach Spring Creek in usable quantities, *plaintiffs are entitled to enjoin defendants's interference therewith.*

Martiny v. Wells, 91 Idaho 215, 219, 419 P.2d 470, 474 (1966) (emphasis added).

Even more clearly, the Court held that:

It is the unquestioned rule in this jurisdiction that priority of appropriation shall give the better right between those using the water. Art. 15, sec. 3, Const. As between appropriators, the first in time is the first in right. [Citations omitted]. *Each junior appropriator is entitled to divert water only at such times as all prior appropriators are being supplied under their appropriations under conditions as they existed at the time the appropriation was made.* [Citation omitted]. The same rule applies whether the appropriator is above or below other appropriators. When water has once been decreed and becomes a fixed right, the water must be distributed as in the decree provided.

Beecher v. Cassia Creek Irr. Co., 66 Idaho 1, 10, 154 P.2d 507, 510 (1944) (emphasis added). That is the law in Idaho, plain and simple. Injury occurs when a senior water right holder is not receiving the water to which he or she is entitled under his or her water right.

(Districts' Comments to First Draft). *See also Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976) (stating that, "As a rule, the law of water rights in this state embodies a policy against the waste of irrigation water. Such policy is not to be construed, however, so as to permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator so long as the water flowing in its natural channels would reach the point of downstream diversion.").

In addition to those previously filed comments, the Districts are concerned about the phrase "legally available." Is the phrase intended to allow further examination into a senior water right holders' use? It would be very helpful, if not mandatory, to define "legally available." It is critical that senior water right holders, in particular, know when water will be deemed "legally" available or unavailable.

The use of the phrase “diverted without waste” is also inappropriate. The Districts are not aware of any Idaho statute or Idaho Supreme Court decision which defines this phrase or incorporates it into a definition of injury. Additionally, the general prohibition under Idaho law against waste does not mandate that lack of waste constitutes a pre-condition to existence of injury. Interjection of these two “waste” concepts as pre-conditions to a definition of injury is entirely unsupported under Idaho law. Injury and waste are two separate concepts under Idaho law. The Department’s misguided attempt to combine the two concepts in this rulemaking exceeds the Department’s authority and constitutes an invalid intrusion into the law-making area of the Idaho Legislature.

G. Mitigation

The definitions of “in kind mitigation,” “mitigation,” and “mitigation plan” are new in the July 10 Draft. The “in kind mitigation” definition is acceptable to the Districts. As to the definition of “mitigation,” the Districts agree that any offered compensation must be acceptable to the senior water right holder. Under no circumstances should a senior water right holder be forced to accept mitigation which is not acceptable to that senior user.

As to the definition of “mitigation plan,” the Districts question the need for the phrase “by or for the benefit of the holder of a junior priority water right.” Mitigation plans might, in some instances, be submitted by a senior priority water user, and all mitigation plans should be for the benefit, not only of the junior water right holders, but seniors as well.

H. Presumptive Depletion

The Districts' main concern about this definition is that the term "depleted" is not defined. This may seem at first glance like an unfounded concern, but a clear understanding of what it means for a quantity of water to be "depleted" is essential in understanding "presumptive depletion." The Oxford American Desk Dictionary (1998) defines "deplete" as "1. reduce in numbers or quantity; 2. exhaust." If "depleted" means "reduced in quantity" or "depletion" means "reduction in quantity," the Districts agree with the definitions of depletion and "presumptive depletion." A quantity of water need not be "exhausted" before it is depleted.

I. Presumptive Injury

The Districts agreed with the Director's previous definition of presumptive injury. However, the Districts also believe that the definition contained in the July 10 Draft is even better. Once again, presumptive injury is appropriate in order to avoid delays in managing water in times of shortage, and also to avoid effective but impermissible reallocation of burdens in times of shortage. The Districts also concur it is appropriate to utilize the rulemaking process, or at least the administrative procedures available when an order is issued, to establish presumptive injury.

J. Waste

The changes to the definition of waste are certainly a step in the right direction. In their comments to the First Draft, the Districts expressed the concern that the "reasonably needed" and "actually used for the beneficial use under a water right" might allow or invite an over-reaching inquiry into use of a water right in time-sensitive periods of shortage. The concerns bear reiteration here:

[After citing *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400 (1997) and *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310, 314 (1960), and the principles regarding waste stated therein:]

The Districts are also concerned that the definition of waste contained in the Draft Rules will lead to intense inquiry into agricultural practices in the name of determining what is “reasonably needed.” For example, the way that the rule is currently drafted, the Department could question a farmer’s decision to grow a water-intensive crop over one which requires less water. Or, the Department could find itself in the business of micromanaging a farmer’s irrigation practices, questioning whether that farmer’s system of changing water and the length of time of each set is “reasonable.”

The Districts note in discussing Idaho Code section 18-4302, which criminalizes the waste of water, the Idaho Supreme Court held that:

[t]he rule instead has been that some loss of water through seepage or evaporation is considered a prerogative of the appropriator, so long as the loss is reasonable. [Citation omitted]. The senior appropriator retains his right to all of the water, including that which is lost through reasonable seepage, and thus may reclaim it, for instance, by improving his transmission system.

Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 101 Idaho 667, 671, 619 P.2d 1130, 1134 (1980). An inquiry into the reasonableness of seepage is very different than an inquiry into “reasonable use.”

Certainly, the law is clear in Idaho that a water user may not waste water, and it is in everyone’s interest to make wise use of water. However, it is equally clear that the Department should not rewrite Idaho law pertaining to waste of water via the Water Management Rules. Examination of water rights under the “reasonably needed” and “actually used” standards goes far beyond an examination of beneficial use.

(Pioneer Irrigation District and Settlers Irrigation District Comments to Draft Water Management Rules, pp. 13-14).

The July 10 Draft definition of waste is an improvement. At the least, the definition acknowledges that conveyance and application losses are not considered waste. Subject to these limitations, the Districts also agree that the amount of water in excess of the amount put to beneficial use is waste. Certainly, no water user should be allowed to use water in excess of the amount that can be beneficially used under a valid water right, conveyance and application losses included. Idaho's water is far too precious a resource to waste. However, concepts of waste cannot be used to allow never-ending inquiries into a long-established senior water right during times of shortage.

K. Water Management

The Districts simply note that the word "constitution" is misspelled.

III.

COMMENTS TO PRINCIPLES FOR WATER MANAGEMENT

RULE 20

A. Rule 20.02 Unauthorized Use

The Districts agreed with the previous version of this Rule. However, the addition of specific examples of the types of actions which may be taken is helpful, because it provides notice of the consequences of unauthorized use.

B. Rule 20.03 Regulation of Diversions

The July 10 Draft has omitted the idea that water *use* will be required to be measured and reported. Instead, only diversion will be measured and reported. The Districts agree with that change.

C. Rule 20.04 Ground Water Management

The Districts agree with this Rule in large part. Specifically, the Districts approve of the reference to Rule 20.13, which requires in kind mitigation unless the senior water user agrees otherwise. Senior water right holders should not unilaterally be forced to accept money or other mitigation in lieu of water.

The Districts also agree that water need not be in a water district in order to be managed in priority. To that end, Rule 20.04(b) recognizes, as we saw in 2001, that ground water management areas are a tool which can be used to manage water outside of a water district.

D. Rule 20.06 Use of Surface Water First

The Districts appreciate that the July 10 Draft version of this Rule attempts to explain why the use of surface water first will be mandated. However, the Districts are still concerned that the requirement places an additional condition on the use of an established right, and still oppose this Rule.

E. Rule 20.07 Reuse and Drainage of Water

The second part of this section is not acceptable. It is directly contrary to the concept of recapture and the expression of Legislature that drainage within an irrigation district do not require new water rights.¹

F. Rule 20.08 Establishment and Use of Response Zones

The Districts agree that response zones should be established through rulemaking or through an administrative proceeding after notice and an opportunity to be heard. The first option is preferable.

G. Rule 20.12 Challenge to Response Zones and Rebuttal of Presumptions

The Districts agree that parties should be permitted to challenge response zones and presumptions if they are affected by them.

H. Rule 20.13 Use of Mitigation

The Districts agree that mitigation must be in kind unless the senior water right holder agrees otherwise. Money cannot take the place of water, and to require that someone accept money when their senior water rights are not being filled is unacceptable.

However, the Districts are concerned about the last sentence in Rule 20.13. The sentence seems to state that “[a]pproved mitigation is provided . . . by implementation of conditions on the exercise of a water right included in any decree, license or approved transfer application,” which would arguably allow someone to take the position that they cannot be curtailed or need not provide mitigation because they have fulfilled the conditions on their water right, even if none of the conditions pertain to mitigation. The Districts suggest that the last sentence be amended to read: “Approved mitigation is provided by implementation of an approved mitigation plan or by implementation of conditions regarding mitigation on the exercise of the water right in any decree, license or approved transfer application.”

IV.

AUTHORIZED AND UNAUTHORIZED DIVERSION AND USE OF WATER

RULE 21

As with the First Draft, the Districts largely agree with the specifically-listed authorized uses. They particularly appreciate the clarification that diversion for water quality purposes is for remediation and research projects. This helps alleviate the concern that Rule 21.02(g) could be used to support an argument that water users could be forced to divert water for water quality purposes.

Rule 21.03(h) provides that “[d]iversion or use of water that the Director has determined constitutes waste, as defined by Rule 10.25 of these Rules, and as set forth in an order with opportunity for hearing under Section 1701A, Idaho Code.” In response, the Districts incorporate by reference their comments to Draft Rules 10.15 and 10.29, defining “injury” and “waste,” respectively.

Rule 21.03(i) provides that “[u]se of water under a ground water right when adequate water is available under a natural flow surface water right for the same beneficial use, except as provided in Rule 25 of these Rules” is an unauthorized use. The Districts reiterate their position that requiring use of surface water first illegally places a new limitation on a water right not found in the license, decree or statutes. This approach violates fundamental constitutional principles of due process.

V.

ROTATION AGREEMENTS

RULE 22

The Director made significant changes to this Rule between the First Draft and July 10 Draft. The Districts support this version of the Draft Rules.

VI.

**WATER QUALITY REMEDIATION
AND
RESEARCH PROJECTS**

RULE 23

The Districts simply note that “contaminants” is misspelled in the first paragraph.

VII.

DIVERSION OF WATER DURING FLOODING

RULE 24

While the intent of this provision is very good, the Districts point out that court decrees (such as the Payette River Basin Adjudication Decree) contain provisions related to the diversion of water in flood situations. To the extent this Rule attempts to modify or change a court decree, the Districts oppose the Rule. Moreover, the last sentence of the Rule makes little sense. If water is being diverted during a flood emergency, to help those downstream, it is difficult to see how putting that water to a beneficial use could injure other water rights.

VIII.

ENFORCEMENT OF THE USE OF WATER RIGHTS FROM SURFACE WATER SOURCES PRIOR TO USING WATER FROM GROUND WATER SOURCES

RULE 25

This Rule has not been significantly changed from the First Draft, and the Districts continue to have concerns. Specifically, requiring the use of surface rights prior to ground water places an additional condition on the use of rights which did not exist when the rights were first obtained. The Districts continue to believe the Department has no authority to unilaterally place such conditions on decreed rights, or on those which have been licensed without that condition.

The Districts also have a specific concern about Rule 25.02(a). The Rule provides that surface water is unavailable when, *inter alia*, “[t]he surface water source does not have a sufficient supply or the supply is physically unavailable to the right holder.” The questions are “sufficient supply for what?” Is it a sufficient supply to fill the water right in question? That term should be clarified. In addition, how much of the surface water supply must be physically unavailable? If a portion of the surface water is unavailable, may the water right holder obtain that amount from a ground water source? Again, this should be clarified.

IX.

GENERAL DUTIES OF WATER DISTRICT WATERMASTERS

RULE 41

The concerns which were previously raised by the Districts regarding this Rule (which was Rule 43 in the First Draft) remain. Therefore, the Districts summarize those concerns and re-emphasize them here:

1. The document which is used by the watermasters to deliver water should list the priority date and the amount of water to which a water right holder is *entitled under a decree or license*.
2. The phrase “as directed by the Department” in Rule 41.01 could be read as allowing the Department to order delivery of water by some means other than priority in times of shortage.
3. Rule 41.03 should be clarified to reflect that *all* means of diversion, including wells, are subject to adjustments, locking, and posting, just as surface water rights.
4. Rule 41.04 and 41.05 seem redundant.
5. Rule 41.09 is unrealistic and not in accordance with Idaho Statutes. Idaho Code section 42-248 requires only that *notice* of a change of ownership be provided to the Department, and gives a new property owner 120 days to provide that notice. However, Rule 41.09 makes it entirely possible that a watermaster could refuse to deliver water to a new property owner the day after the transaction is completed. The Districts advocate a change to this Rule which correctly reflects the Idaho Code and the realities inherent in property transfers and administrative necessity.

The Districts also have a concern about Rule 41.04, concerning record keeping. If record books are to be maintained daily, then all water right diversions should be measured daily, in contrast to Rule 42.01(c). In Rule 41.08, a watermaster is directed to develop a work plan. The Districts do not see that Idaho Code section 42-615 provides for a “work plan.” Consequently, such an addition may constitute an administrative attempt to legislate. At a minimum, the “work plan” concept should be defined and the regulatory impact of such a plan must be expressly stated in the Rules.

X.

ENFORCEMENT DUTIES OF WATERMASTERS

RULE 42

The Districts continue to believe that the rate of diversion measurement, from whatever source, should be based upon the same time period. The Districts agree with the Director's refusal to use a thirty-day average by which to measure groundwater diversions; such a long period of time would simply allow over-diversion to continue well past the time that the damage has been done. However, it is unfair and constitutionally indefensible to have different measurement time periods for ground water and surface water rights.

XI.

DIVERSION RATE FROM GROUND WATER SOURCES

RULE 43

The Districts disagree completely with Rule 43.02, allowing a monthly average diversion rate for ground water under certain circumstances. If surface water rights must be based on a 24-hour average, even a seven-day average for ground water rights is pushing the envelope. A thirty-day average is simply unacceptable.

XII.

**MEASUREMENT AND ENFORCEMENT OF WATER RIGHTS
NOT IN A WATER DISTRICT**

RULE 80

The Districts maintain that water rights should be administered in priority, whether in a water district or not (considering, of course, the futile call doctrine). The Districts question

whether we can have meaningful conjunctive management and administration if some water rights are allowed to continue out of priority.

XIII.

MEASUREMENT AND REPORTING OF WATER DIVERSION AND USE

RULE 90

The Districts continue to believe that *all* diversions should be measured, not just those which fall within the categories set forth in Rule 90.02. The “Alternative Methods” of measurement may be acceptable, as long as the Director truly does require that the alternative method be accurate.

XIV.

CONCLUSION

The Districts appreciate the efforts of the Director and his staff to draft Rules which are more complete. The Districts further believe that significant strides have been made, and that the July 10 Draft is, in many respects, an improvement over the First Draft. Continued careful consideration of comments is critical.

The prior appropriation doctrine is the law, by constitution, statute, and case law, in Idaho. It must be, not only acknowledged, but followed in these Rules, as should the fundamental principles of Idaho water law.

Thank you for the opportunity to provide comments. The Districts look forward to continuing to work with the Director and other parties, to create workable, sensible, and legally defensible Water Management Rules.



Aberdeen-Springfield Canal Company

144 South Main

PO BOX 857

Aberdeen, ID 83210

Tel (208) 397-4192 Fax (208) 397-4510 Email: ascc@ida.net

October 29, 2001

RECEIVED

OCT 31 2001

Department of Water Resources

Norm Young
1301 N. Orchard St.
Boise, ID 83642

Re: Objection to Draft Statewide Water Management Rules

Dear Norm,

The Board of Directors of Aberdeen-Springfield Canal Company wishes to lodge an objection to the Draft Statewide Water Management Rules (Rules) §020.07. Reuse and Drainage of Water. This section states, "Water may also be diverted for drainage purposes to improve or preserve the utility of the land without a water right *provided the water diverted is returned to a source of public water without application to beneficial use...*" (italics added).

It is Aberdeen-Springfield Canal Company's opinion that this rule is in direct contradiction to Idaho Code §42-228 which clearly states, "...there shall be excepted from the provisions of this act the excavation and opening of wells and withdrawal of water therefrom by canal companies, irrigation districts, and other owners of irrigation works for the sole purpose of recovering ground water resulting from irrigation under such works *for further use on or drainage of* lands to which the established water rights of the parties constructing the wells are appurtenant;..." (italics added).

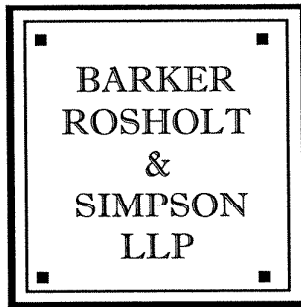
The draft Rules thus create confusion as to when water diverted under a water right for beneficial use on appurtenant lands becomes public water. Idaho Code is very clear that ground water resulting from the irrigation of lands under a valid water right may be withdrawn by wells and re-used for the same beneficial purposes for which it was originally diverted.

Thank you for your consideration of our objection.

For the Board of Directors

Steven T. Howser
General Manager

*John A. Rosholt
Albert P. Barker
John K. Simpson
Amy D. Chestnut
Travis L. Thompson*



1221 West Idaho Street, Ste 600
Post Office Box 2139
Boise, ID 83701-2139
(208) 336-0700 telephone
(208) 344-6034 facsimile
brs@idahowaters.com

142 3rd Avenue
Post Office Box 1906
Twin Falls, ID 83303-1906
(208) 734-0700 telephone
(208) 736-0041 facsimile

October 31, 2001

RECEIVED

OCT 31 2001

Department of Water Resources

Hand-Delivered

Norm Young
Idaho Department of Water Resources
1301 North Orchard Street
P.O. Box 83720
Boise, Idaho 83720-0098

Re: Water Management Rules (July 10, 2001 Version)

Dear Norm:

In compliance with the Department of Water Resources' letter of August 24, on behalf of Twin Falls Canal Company, North Side Canal Company, Clear Springs Foods, Inc., and Buckeye Farms, we submit the following comments and concerns regarding the draft Water Management Rules ("Rules") issued and dated July 10, 2001. These comments are supplemental to and incorporate the comment letters previously filed with the Department as of February 26, 2001 and June 6, 2001. The initial comments specify concerns applicable to the general scope of the proposed Rules followed by more specific comments directed to a particular rule along with suggested revisions.

Overall, in light of developments since the initial draft rules released in January 2001, the comprehensiveness of the rules should be evaluated and minimized. Current developments and progress in regards to mitigation agreements and designation of ground water management areas in various parts of the State provide a different background for implementation of these Rules. Initially, when the first draft of rules was released in January, progress had not been made in regards to a conjunctive administration general provision. Since that time, ground and surface water users have attempted to mutually resolve differences with the development of agreements in certain basins that provide for some mitigation. Implementation of rules that are far-reaching

and broad in scope may inhibit the progress of such agreements. Drafting rules that are general in nature provides the parties with flexibility in designing options to resolve differences.

Additionally, the scope of the Department's rulemaking authority to include in the Rules such concepts as presumptive injury and presumptive depletion is unclear. An administrative agency, such as the Department, only has such powers as a statute or ordinance confers. See *Beker v. Georgetown Irrig. Dist.*, 101 Idaho 187 (1980). The Department is authorized to promulgate rules implementing the powers and duties of the Department. I.C. 42-1805(8). As a result, administrative rules have to derive from this legislative delegation of authority. The directive of the legislature and the courts is that the Director is to administer water rights according to the prior appropriation doctrine. *Idaho Const. Art. XV, §3*; *Musser v. Higginson*, 125 Idaho 392 (1994). Therefore, these rules are to be in accordance with administration pursuant to the prior appropriation doctrine.

It is permissive for an agency to develop administrative rules, when given general rulemaking authority, to provide more specific requirements to general statutory phrases or terminology. J.C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 *Envtl. Law* 919, 958. However, rules that the legislature has delegated authority to promulgate must comply with the legislative intent of the enabling statute. *Mead v. Arnell*, 117 Idaho 660, 668 (1990). The scope of the draft Rules goes beyond the statutory framework and intent of the Idaho Code. The Code is not ambiguous or general in how the Department is to administer water rights and the Director's authority. See I.C. 42-237ag. Until the legislature provides more explicit direction to the Department, beyond what is already included in the Idaho Code, then the draft Rules should reflect the existing statutes and Idaho law.

The optimum development of water resources is a constitutionally mandated goal. However, the decision as to how the optimum development of water resources can best be achieved is within the province of the legislature. *Parker v. Wallentine*, 103 Idaho 506, 512 (1982)(the Ground Water Act was the legislature's choice for implementing that policy). The Department can not implement rules that violate the legislature's directive.

The retroactive application of new standards and definitions raise a question of legality. The development of rules that impose new factors, when considering such things as "injury," upon already vested water rights is not permissive. The Department does not have authority or the power to interfere with vested rights. *Cantlin v. Carter*, 88 Idaho 179, 186 (1964). The implementation of rules that do not adhere to and reflect current Idaho law results in different standards being applied to water rights. Retroactively applying the rules to water rights already existing would require legislative approval.

Overall, the scope of the draft Rules should remain broad to avoid questions of infringement upon the separation of powers doctrine. The draft Rules re-define Idaho law and the prior appropriation doctrine. This type of action is not permissible by an administrative agency. To permit and encourage on-going discussions regarding mitigation, the draft Rules

should additionally be broad. Before implementing these Rules, more guidance from the legislature is appropriate.

While the comments herein were an attempt to be as inclusive as possible, another general objection to the draft rules is that citations to specific case law or statutes should be omitted from the rules. Inclusions of such references are redundant and could result in misinterpretations of law through application of the rules.

Specific Rules:

Rule 0. Legal Authority.

The "legal authority" section specifies particular statutes in which the Director is provided the power to appropriate ground and surface water. Rather than listing statutory sections, it should be stated that such powers and duties are in accordance with Idaho law. Limiting the identification of the Director's authority to that which is identified in the statute eliminates duties specified or clarified in case law. For example, see *Musser*, 125 Idaho at 394-95.

The last paragraph of this section specifies that rules relating to water districts are also promulgated. The necessity of such rules is questionable since the Idaho Code already indicates the guidelines for water districts. The Department should clarify the need for additional rules. This clarification is sought especially since the rules reiterate the specifications in the statutes.

Rule 1.02. Scope.

The proposed Rules are specified to be applicable to the "use of the waters of the state." If this is the case, then Rule 20.07 (Reuse and Drainage of Water) should be eliminated. This rule applies to the recovery and recapture of water before it becomes part of the "public water." The recapture of such water is not part of the waters of the state but could be considered as part of the original project water. See I.C. §42-228. As a result, these rules would not be applicable as such water being recovered is not part of the waters of the State.

Rule 1.04. Idaho Law and Prior Appropriation Doctrine.

The necessity for this rule is unclear in that Idaho law does incorporate and is based upon the prior appropriation doctrine. The inclusion of such a statement indicates that these rules could be construed as contrary to the prior appropriation doctrine as defined in Idaho law. Such a guiding statement should logically be unnecessary.

Rule 10.02. Conjunctive Administration.

The term "conjunctive administration" differs from the wording in the existing *Rules for Conjunctive Management of Surface and Ground Water Resources* ("Conjunctive Management Rules"), IDAPA 37.03.11. In the Conjunctive Management Rules, the term "conjunctive

management” is defined differently than “conjunctive administration.” The inconsistencies between the umbrella statewide rules and the Conjunctive Management Rules result in the use of multiple terms that essentially have the same meaning. The differences between the two result in inconsistent and confusing administration. The Conjunctive Management Rules are applicable in the case of a “delivery call” by a senior in priority water user. The Rules at hand are to apply to the administration of water by the Department in general. The result is that this definition should be eliminated or broadly defined in order to avoid such inconsistencies between existing and proposed rules.

The conjunctive “administration” definition should be modified as the “*administration of the diversion and use of hydraulically connected water as a single source recognizing the relative priorities of the water rights.*” This definition is consistent with other definitions of “conjunctive administration” previously adopted by the Department and with the directives of the Idaho Supreme Court. Please refer to IDAPA 37.03.12, *Idaho Department of Water Resources Water Distribution Rules – Water District 34, Rule 10.05; A& B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 422 (1997).

10.03. Critical Ground Water Area.

This definition is not necessary as a “critical ground water area” is already defined by the legislature in I.C. §42-233a. If a definition is to be included, to permit further modifications of the statutory definition be included in the rules, the definition should be: “*Any ground water basin, or part thereof, identified and designated pursuant to I.C. §42-233a.*”

10.05. Director.

The current definition could be interpreted to mean that an employee can be identified as the director pursuant to I.C. §42-1701. This portion of the definition should be eliminated. I.C. §42-1701 states that the director may delegate to an employee duties that are imposed upon the director. The employee is not then acting for the director but undertaking delegated duties.

10.08. Elements.

An element of a water right is not defined to include “extent of use.” As specified by statute, I.C. §42-1411, the elements of a water right to be identified by the director does not incorporate “extent of use.” Inclusion of this factor as an element is an extension of the director’s authority and duties in evaluating a water right. Thus, this portion of the definition should be deleted.

10.09. Expansion.

An expansion of a water right is not authorized and cannot result in an increase in the “extent of beneficial use” as specified in the definition. For additional comments, see letter of February 26.

10.12. Ground Water Management Area.

This definition is not necessary as a “ground water management area” is defined in the Idaho Code, §42-233b. The definition is also inconsistent with the “ground water management area” definition provided in the Conjunctive Management Rules. See IDAPA 37.03.11, Rule 10.09. If a definition is included, it should be: *“any ground water basin, or part thereof, identified and designated pursuant to I.C. §42-233b.”*

10.13. Hydraulically Connected Ground Water and Surface Water.

Please refer to comments of February 26, 2001.

10.14. Injury.

This definition is not necessary as “injury” is defined by case law and this rule re-defines it. For additional comments, see February 26 letter.

“Waste” is not incorporated as part of the definition of “injury” in Idaho law. As specified by the courts, the law of water rights embodies the policy against waste of irrigation water. *Gilbert v. Smith*, 97 Idaho 735, 739 (1976); *Martiny v. Wells*, 91 Idaho 215 (1966). However, this policy is not to be construed to permit a junior appropriator to interfere with a senior in priority. *Martiny*, 91 Idaho at 219. Inclusion of “waste” within the definition of injury misconstrues the definition of injury and permits the Department to use “waste” as a means of limiting a senior appropriator’s water right.

To be consistent with Idaho law, the definition of “injury” should be: *When water diverted under a junior priority water right diminishes the amount of water that otherwise would have been legally and physically available under the senior priority water right.*

10.15. In-Kind Mitigation; 10.17. Mitigation.

Inclusion of a definition of mitigation is contrary to the purposes of mitigation. By including specific definitions of mitigation, water right users are inhibited and may be precluded from discussing other alternatives to mitigation than what is specified in the rules.

Additionally, the Department’s jurisdiction and authority to oversee mitigation plans is unclear and not provided for in existing legislation. Please refer to In Re SRBA Case No. 39576, Subcase Nos. 36-02708 et al., *Order on Challenge of “Facility Volume” Issue and “Additional Evidence” Issue* (“Facility Volume”)(12/99). The Director has a duty to administer water rights in accordance with the prior appropriation doctrine. Please refer to *Musser*. By regulating voluntary mitigation plans that permit junior users to not be curtailed or administered pursuant to the prior appropriation doctrine violates the constitution and laws of Idaho. Water users are

permitted to mutually and voluntarily agree to mitigate and develop agreements detailing such actions.

If a definition of “mitigation” is to be included, it should be broadly defined to permit parties to determine what would be considered appropriate mitigation for that particular case. There is no need to distinguish between “in-kind mitigation” and “mitigation.” “Mitigation” incorporates “in-kind mitigation.” Therefore, “*Mitigation. An action taken by or for the benefit of a junior priority water right to prevent injury to a senior priority water right.*”

10.16. Mitigation Plan.

The definition of mitigation plan incorporates the ability of the Director to approve the plan as specified in Rule 43, Conjunctive Management Rules. As previously discussed, the authority of the Department to approve such plans is questionable and not clearly provided for by the legislature. In terms of permits for application, the Department in its *Water Appropriation Rules* has indicated that if a proposed application for permit results in injury to other water right holders, said application could be approved based upon appropriate mitigation. Thus, a permit may be conditionally approved upon sufficient mitigation. However, this guideline has not been carried-over or explicitly provided for in the administration of water rights. The prior appropriation doctrine is the guiding framework for administering water rights.

The issue that remains to be clarified by the rules or legislatively is the Department’s ability to enforce mitigation plans or agreements. Arguably, if the parties mutually submit an approved mitigation plan, pursuant to the Director’s authority to administer water rights, such a plan could be enforced. This authority should be clarified in the rules or pursued with the legislature.

The other component of the definition of a “mitigation plan” specifies that it is a document submitted as provided in Rule 43, Conjunctive Management Rules. The applicability of the Conjunctive Management Rules criteria is not authorized. The Conjunctive Management Rules identify procedures for responding to a delivery call made by a senior priority water right holder against a junior priority water right holder. See IDAPA 37.03.11, Rule 1. The section pertaining to mitigation plans then would only be applicable if developed in lieu of a delivery call. Rule 43 does not have general applicability to any mitigation developed between water users. The courts have already specified that the Conjunctive Management Rules do not apply to the administration of interconnected ground and surface water. *A&B Irrigation Dist*, 131 Idaho at 422. Therefore, Rule 43 can not be applicable to an arrangement that is not within the realm of the Conjunctive Management Rules. Incorporation of the Conjunctive Management Rules into the general water management rules expands the applicability of those rules in contravention of Idaho law.

Overall, the definition of a mitigation plan is not needed at this time. The flexibility and ability for parties to freely design a mitigation plan is the intent behind such a concept. Until the

Department clearly has established authority to oversee and enforce mitigation, the definitions and rules relating to mitigation are premature.

10.21. Presumptive Depletion.

The authority of the Department to define administration pursuant to the prior appropriation doctrine to include “presumptive depletion” is not well founded. Inclusion of this concept in rulemaking rather than the legislature first identifying this as a component of water rights administration in Idaho is in error. Even states, such as Colorado, that have implemented administration using presumptive depletions or injury have done so statutorily and supplemented with rulemaking. For example, see CRSA 37-92-502. The Department delegating authority to itself to make such determinations is not clearly identified in its enabling statutes. Prior to adoption of such rules, the Department’s authority to administer water rights pursuant to presumptive depletions or presumptive injury should legislatively be decided.

Nonetheless, the proposed definition needs further clarification. The definition distinguishes depletions from surface water due to ground water and vice versa. The need for such distinction is unclear. To eliminate exclusion of some water right connections, the definition should not differ between such connections.

The definition also specifies that the Director can make such determinations “based on any available information which may include simulations from mathematical models.” As previously indicated, a more definite standard should be specified that guides the Director’s basis for making determinations regarding presumptive depletions. As used in other administrative regulations, the standard of “best available science” is applicable as an appropriate guideline. See, Clean Water Act.

This definition should be consistent with other documents provided by the Department discussing such concepts. In the *Director’s Response to Opening Briefs, Basin-Wide Issue 5*, a presumptive depletion “is the amount of depletion to connected surface water sources calculated to occur using a ground water model for a specific use of ground water. When depletions reduce the quantity of water needed to satisfy earlier priority water rights, injury may occur.” Response, p11. In this report, correlation is made between injury and depletion. In Rule 20, the remark is inserted specifying that presumptive depletion is not presumptive injury but may be used as a factor in determining presumptive injury.

Therefore, the definition should be changed as follows: “The quantity of water depleted from one water source resulting from the diversion of water from another water source as determined by the Director based on the best available science.”

10.22 Presumptive Injury

This Rule is not necessary at this time as the determination of “injury” occurs on a case-by-case basis. Determining presumptive injury on the basis of the definition of “injury” that

incorporates “waste” into evaluating whether or not another water user is injured is erroneous. This promulgation of the definition of injury violates Idaho law and also is contrary to previous decisions by the Department. Please refer to discussion herein, section *10.29 Waste*.

10.23. Reasonable Pumping Lift

The use of the term “lift” is inconsistent with authorizing statutes permitting the Department to impose “reasonable pumping levels.” I.C. 42-226. For consistency and compliance with legislative guidance, the term should be modified to state “level” instead of “lift.” Additionally, the inclusion of a specific definition is not necessary as the legislature has previously defined and permitted the Director to identify a reasonable pumping level.

10.24. Response Zone.

Refer to comments of February 26, 2001.

10.25. Rotation Agreement.

A definition is not necessary as this is a voluntary agreement between water users

10.29. Waste.

The concept of “waste” is already included in the law applicable to water rights. *Gilbert v. Smith*, 97 Idaho 735 (1976). A definition is not necessary and should not be included in the Rules. Inclusion of such a definition permits the Department to incorporate this concept into the evaluation of “injury.” As previously discussed, the re-evaluation of beneficial use and waste after a water right has been decreed is questionable. The Department does not have authority to re-condition a water right during the administration process based upon its evaluation of waste and “reasonable” conveyance and application losses. The inclusion of this definition within “injury” permits the Department to consider “reasonable conveyance losses” in evaluating the extent of injury. This analysis is contrary to the Department’s own application of “injury.”

In evaluating permit applications, the Department has restricted approval of such an application due to injury that is real and actual even if minimal. See *In the Matter of Applications for Transfer No. 5174 in the Name of Dennis M. Baker and No. 5175 in the Name of Huf-N-Puf Trust, Final Order* (11/25/98). This analysis did not consider the extent of use the existing water right users or the “waste.” Permitting a junior appropriator to pump from an adjacent aquifer hydraulically connected to a river when downstream senior water rights are curtailed is inconsistent with Idaho law. *Id.* at p3. Inclusion of “waste” in evaluating injury pursuant to these Rules is contrary to the policies and existing precedent of the Department.

Inclusion of “conveyance and application losses” in the definition of “waste” results in, arguably, the incorporation of these losses into the analysis of waste. Idaho law does not define waste to include such losses and the Rules should be carefully drafted to avoid such an

interpretation. Furthermore, the concept of “waste” is already included in the definition of “unauthorized use” defined in Rule 10.28.

10.30 Water District.

No need for definition when the entity is already defined and governed by statute. See I.C. §42-604.

10.31. Water Management.

This definition should be eliminated in that it violates the constitutional guidelines and requirements of water administration in Idaho. The prior appropriation doctrine is the governing doctrine. Implementation of the “full economic development of the water resources of the state” indicates that the full economic development concept is equally applicable to administering water rights as is the prior appropriation doctrine. This concept is contrary to Idaho law. Full economic development is applicable to the development of ground water resources and resulted in the implementation of “reasonable pumping levels.” *Baker v. Ore-Ida Foods*, 95 Idaho 575 (1973); *State Water Plan*, 1H.

To be consistent with existing Idaho law, the definition should be limited to state that: *“The control and regulation of the rights to use surface and ground water resources of the state in accordance with Idaho law.”* This definition permits the Department to flexibly alter its administration pursuant to and in compliance with the legislative and judicial modifications to the prior appropriation doctrine.

10.32. Watermaster.

The definition of watermaster refers to I.C. 42-801. Reference to this provision is inappropriate in defining a water master as that is the provision permitting the appointment of a special deputy to distribute stored water unless a watermaster is already appointed to do so.

10.35. Water Right.

A definition of this right should be broadly construed to refer to Idaho law rather than enumerate the various bases for establishing a water right. With the resolution of the adjudication, defining a water right based upon beneficial use will not be viable.

10.36. Waters of the State.

I.C. §42-101 identifies “waters of the state.” Additionally, the definition of “waters of the state or public water” is already provided for by case law and is the result of a case specific analysis. ie. *Boise Irrig. and Land Co. v. Stewart*, 10 Idaho 38 (1904); *Rabido v. Furey*, 33 Idaho 56 (1920); *Maher v. Gentry*, 67 Idaho 559(1947)(water from natural spring and that flow off

premises upon which are located are public waters). The Rule should generally refer to those waters identified by Idaho law as “waters of the State” or “public water.”

Waters of the State. All surface and ground water defined as such by Idaho law.

Principles for Water Management (Rule 20)

20.01 Authorized uses; 20.02. Unauthorized use.

These rules should either be deleted or limited in scope. Various statutes, as indicated in the Rule, already provide the Department with authority to take necessary action to limit or eliminate unauthorized uses. By identifying the particular provisions, it is possible to construe these authorities as the only means available to the Department when other options may be available or developed by the legislature. A definition of “authorized uses” is not required as the rules do not delineate any further actions in light of such uses. It is merely a policy statement. As discussed in our prior comments, the indication that the action taken by the Department could include mitigation measures is not permissible as the Director can not require a party to accept mitigation in lieu of an action such as a delivery call. An appropriate action by the Director could include enforcement of an order resulting from a “delivery call” and the rule could be construed to preclude such an action in lieu of mitigation.

The “unauthorized use” definition should be limited to: *“Unauthorized uses are prohibited. The Department will take one or more appropriate actions as provided by Idaho law.”*

20.03. Regulation of diversions.

This rule is not necessary as Idaho Code already indicates the Department is to regulate and impose measurement devices in administering water rights. I.C. 42-1805.

20.04. Ground water management.

The distinction between administration of ground water hydraulically connected to surface water versus ground water to ground water connection is unnecessary. Idaho law requires the prior appropriation doctrine to apply in administering all water rights. *Idaho Const. Art XV, § 3*. The additional guidelines applicable in administering two ground water sources, as indicated in the rule as reasonable pumping “lifts,” are specified in statutory law. I.C. §42-226. To remain consistent with existing law, this additional clarification is not necessary and is not always consistent with terminology of these statutes.

The rule additionally differentiates between water being administered in an area of common ground water supply versus an area not incorporated in a water district. This distinction is not necessary in that the code already indicates that if a water district exists, the watermaster

would have authority to curtail water rights. Rule 20.04(b) specifies that the Director will have authority to curtail pursuant to I.C. 42-237ag unless mitigation is provided.

Ground Water Management. Rights to use ground water will be administered to prevent injury to senior priority water rights in accordance with Idaho law.

20.05. Surface water management.

Similarly to the comments herein to Rule 20.04, distinction between water rights within or outside a water district is unnecessary. The director still has authority to administer water rights and curtail pursuant to the prior appropriation doctrine.

20.06 Use of surface water first.

The rule could be construed to indicate that surface water only has to be used first “to minimize depletions from a ground water source and to maintain incidental recharge to the ground water source.” The requirement to use surface water first is not limited to specific purposes or situations. This is a general guiding principle applicable to all water rights.

20.07 Reuse and Drainage of Water.

The first sentence of this rule is not necessary as it is a restatement of Idaho law. For further comments, please see February 26 letter.

20.09. Establishment and Use of Presumptive Depletions.

Both this rule and the following rule, 20.10, Establishment and Use of Presumptive Injury, raise questionable issues regarding shifting of burdens of proof. In implementing either presumptive depletion and/or injury, by additional rulemaking or administrative order, the burden of proving injury shifts to the junior or senior in priority depending upon the outcome of the Department’s conclusions. However, in Idaho law, the argument has been made that whom has the burden, junior or senior priority water users, is unclear. D.L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, Land and Water Law Review, vol. XXII, no.1, 63, 92-3 (1987).¹ The implementation of such rules appears to resolve the question through rulemaking rather than legislatively or judicially. This violates the separation of powers principles in that rulemaking can not be used to establish law and is not given the weight of statutes. *Mead v. Arnell*, 117 Idaho 660 (1990). Rulemaking is a delegation of authority to an executive from the legislature and is not a constitutional grant of power to the executive. *Id.* at 669. By implementing the concept of

¹ Arguably, as indicated in the article, once it is established to be probable that the junior diversion interferes with the senior right if the senior source is fully appropriated by the junior user, then the junior in priority must demonstrate that the particular water does not cause interference.

presumptive depletions and presumptive injury, the Department is unduly shifting the burden of proof without the necessary authority and guidance from either the legislature or courts.

These rules should not be implemented now or defined as the following:

Establishment and Use of Presumptive Depletions. The Director may establish presumptive depletions based upon the diversion and use of ground water. Presumptive depletions shall be established through rulemaking initiated pursuant to the Idaho Administrative Procedures Act, I.C. §67-5201 et seq.

20.10 Establishment and Use of Presumptive Injury.

The inclusion of factors in evaluating injury is contrary to Idaho law and to the Department's own analysis of injury undertaken in contested cases. Idaho law does not define "injury" to incorporate such considerations as proposed by the rule. In general, the courts have specified that injury to another water users must be the result of being "substantially injured, not merely a fanciful injury, but a real and actual injury." *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1 (1944). The Department's application of this definition results in a consideration of the depletive effect of water use and does not consider the factors enumerated in this rule. Implementation of such a rule results in inconsistencies between appropriating water or evaluating transfer applications and administering water rights. There should not be such a distinction as the Department is required to adhere to the prior appropriation doctrine in completing its duties. The prevention of injury to other water rights is part of that doctrine and the definition does not differ depending upon what duty the Department is undertaking.

As has been recognized by other courts, the determination of injury is dependent on a factual analysis, case-by-case. See *City of Roswell v. Reynolds*, 522 P.2d 796 (N.M. 1974). Implementation of rules permitting the Director to establish presumptive injury does not permit for a case-by-case analysis.

20.13. Use of Mitigation.

The specification that "approved mitigation" is allowable should be clarified. The rule should clearly state that the Director would allow mitigation when approved by all parties. The required approval is that of the parties affected, as the Director does not have authority to impose upon a party mitigation rather than curtailment.

In referencing approval of a mitigation plan in accordance with Rule 43, Conjunctive Management Rules, is not consistent with current actions by the Department. Even in orders pertaining to new applications or transfers, reference to Rule 43 in evaluating mitigation or requiring mitigation is inconsistent. The applicability of that rule in administering water rights, in general and not pursuant to the Conjunctive Management Rules, is questionable.

The rule should be modified to state:

The Director will allow out-of-priority diversion and use of surface or ground water that would otherwise cause injury to a senior priority water right when mitigation approved by all parties is provided. Approved mitigation is provided by implementation of a mitigation plan, approved by all parties, or by implementation of conditions on the exercise of the water right included in any decree, license, or approved transfer application.

20.14. Primary enforcement through water districts.

This rule should be modified to indicate that the Department is not precluded from enforcing limitations on water diversions until the formation of water districts. See prior comments, February 26, 2001. The last sentence of the rule should state:

However, such administration shall not preclude an individual water right holder or the Department from seeking other enforcement measures provided under Idaho law.

Rule 21. Authorized and Unauthorized Diversion and Use of Water.

The enumerated exceptions and specifics as to the uses to be made in accordance with a water right and authorized uses should be eliminated. There are factors that are not included in this list that would result in interpretation of the rules to mean that it is permissible for other actions to occur that would result in injury to senior water rights. Refer to comments of February 26.

Rule 22. Rotation Agreements.

This rule is not necessary as these are voluntary agreements between parties and the Department does not have authority of such agreements. Please see comments of February 26.

Rule 23. Water Quality Remediation and Research Projects.

The Department's authority to permit the development of water quality projects without a water right is not valid. A water right is required for all uses of water unless legislatively excepted. Additionally, the Department of Environmental Quality has jurisdiction over water quality issues. These rules should be deleted.

Rule 24. Diversion of Water During Flooding.

This rule is not necessary as Idaho law already provides for authority to do flood control projects. See I.C. §42-3601 to 42-3604.

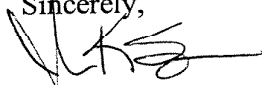
Rule 25. Enforcement of the Use of Water Rights from Surface Water Sources Prior to Using Water from Ground Water Sources.

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The proposed Rule specifies that water under a ground water right only shall be used if "natural flow" surface water is unavailable. The basis for specifying "natural flow" is unclear. The rule should eliminate this distinction and merely state that water not be diverted under a ground water right unless the amount of water available for use from a surface water right is physically or legally unavailable. Otherwise, those users whose surface water right is being supplied by storage water have an unwritten exception to this rule.

Again, we appreciate your continued willingness to seek input on development of these rules. We look forward to further discussions with you and for your response to those comments timely submitted.

Sincerely,


for John A. Rosholt


John K. Simpson


for Amy D. Chestnut

ROGER D. LING
BRENT T. ROBINSON

JASON D. WALKER
TIMOTHY J. SCHNEIDER
ASSOCIATES

LING & ROBINSON
ATTORNEYS AT LAW
615 'H' STREET
P. O. BOX 396
RUPERT, IDAHO 83350-0396

AREA CODE 208
TELEPHONE 436-4717
FAX 436-6804

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October 30, 2001

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Department of Water Resources

Norman C. Young, Administrator
Water Management Division
Department of Water Resources
P. O. Box 83720
Boise, ID 83720-0098

RE: Draft Statewide Water Management Rules of July 10, 2001

Dear Norm:

Pursuant to the Notice of the Director of IDWR dated August 24, 2001, I am hereby submitting my comments for your consideration in regard to the Draft State Water Management Rules above referred to. For ease of comparing my comments with the Draft Rules themselves, I will attempt to make my comments to specific proposed rules.

RULE 0 - LEGAL AUTHORITY. In attempting to identify the statutory authority of the Department to control the appropriation and use of surface and ground waters within the State of Idaho, you have either intentionally or inadvertently omitted statutes which are part of the laws of the State of Idaho which control the appropriation and use of surface and ground waters, whether or not such statutes are viewed as favorable to the Department. You should include Sections 42-227 and 42-228, Idaho Code. It is also suggested that the appropriation and use of surface and ground waters is also controlled by the Constitution of the State of Idaho and case law, including the prior appropriation doctrine as noted in Section 42-601, Idaho Code. Finally the rules should apply only to surface and ground waters of the state, not within the state.

RULE 1 - TITLE AND SCOPE. No comment.

RULE 2 - WRITTEN INTERPRETATIONS. No comment.

RULE 3 - ADMINISTRATIVE APPEALS. No comment.

RULE 4 - IDAHO LAW AND PRIOR APPROPRIATION DOCTRINE. This rule should be incorporated into Rule 0.

RULE 5 - OTHER AUTHORITIES REMAIN APPLICABLE. No comment.

RULE 10 - DEFINITIONS.

01. Beneficial Use Claim. It is unclear as to the need for a reference to Section 42-1409(2), Idaho Code, as this refers only to an amendment of a notice of claim, whereas the entire Section 42-1409 deals with the filing of a notice of claim in an adjudication proceeding.

02. Conjunctive Administration. I would suggest that this definition be expanded. Conjunctive administration occurs when there are separate surface water rights that are hydraulically connected and separate ground water sources that are hydraulically connected, as well as hydraulically connected surface and ground water sources. It is difficult to identify all of the factors which must be considered in administering connected water sources. It does not seem to be appropriate to attempt to identify these factors in the definition.

03. Critical Ground Water Area. It seems that a reference to the statute would be sufficient. This would allow the rule to automatically change should the statute be changed.

04. Department. No comment.

05. Director. No comment.

06. Diversion Rate. No comment.

07. Domestic. No comment.

08. Elements. It seems that this definition should follow Section 42-1411, Idaho Code. The quantity of water can be defined as the rate of diversion, the rate of flow instream, or the annual volume of diversion. The "extent of use" is unclear and should be deleted. There should be added, "other Matters as are necessary for definition of the right or for clarification of any element of the right."

09. Exchange. It seems that "rotation" is a form of "exchange" and should be so noted in this definition.

10. Expansion. No comment.

11. Ground Water. Although the definition is consistent with Section 42-230(a), Idaho Code, does this mean that if one desires to build a drain to capture ground water to improve the utility of his land, it cannot be rediverted and used unless there is an appropriation under Section 42-229, Idaho Code?

12. **Ground Water Management Area.** I would again suggest that reference to the statute would be the appropriate definition, so that if the statute is changed, the definition automatically changes.

13. **Hydraulically Connected Ground Water and Surface Water.** This definition is incomplete and, to some extent, inaccurate. Changes in water levels within the ground water source may affect the flow of the ground water to the surface water source, but does not necessarily change the flow of water from the surface water source to the ground water source. Such waters would still be interconnected.

14. **Idaho Law.** No comment.

15. **Injury.** Rather than describe when an injury occurs, injury should be defined as a diminishment in the amount of water that otherwise would have been physically and legally available under a senior water right as the result of the acts of a third party, including but not limited to junior appropriators. There is no reason to discuss waste. If unlawful waste is occurring, the water being illegally wasted is not legally available.

16. **In-Kind Mitigation.** It is immaterial as to who provides in-kind mitigation. In-kind mitigation should merely be defined as: "Replacement water provided to or for the benefit of the holder of a senior priority water right which prevents injury to the senior priority water right holder."

17. **Mitigation.** No comment.

18. **Mitigation Plan.** A mitigation plan should not be merely a document that identifies actions to provide mitigation, but must be a plan in writing that provides the method by which mitigation for the injury to a senior priority water right by the acts of a third party, including diversions by a junior priority water right holder, will be provided. It is doubtful that the Director has the authority to approve such a plan unless it is mutually agreeable or is "in-kind mitigation."

19. **Person.** No comment.

20. **Power Consumption Coefficient (PCC).** No comment.

21. **Presumptive Depletion.** If the rules are to provide authority to the Director to make a finding of "depletion," it must be based on something other than "available information." There must be some standard of proof, the minimum of which would be a "preponderance of the evidence."

22. Presumptive Injury. Again, the definition must include some standard of proof. In view of the definition of "injury," a "presumptive injury" would be established when the preponderance of evidence shows that the amount of water which would have been physically or legally available under the senior water right was diminished by the diversion of a junior priority water right holder.

23. Reasonable Pumping Lift. This definition does not address the concerns that the Director should address in the enforcement of Section 42-226, Idaho Code. A "reasonable ground water pumping level or levels" may consist of numerous factors, only one of which would be the lift. Even if the lift is reasonable, economically, it may not provide the water that was available prior to the lowering of the ground water table. Therefore the term being defined should be the "reasonable ground water pumping levels."

24. Response Zone. Again, the standard should be something more than "available information." Available information may consist of nothing more than hearsay. If nothing more, the standard should be the "best evidence available."

25. Rotation Agreement. No comment.

26. Stockwater. No comment.

27. Surface Water. Reference to Section 42-103, Idaho Code, should be deleted, as this section of the Code provides no definition whatsoever of "surface water."

28. Unauthorized Use. The "elements" of a water right include the terms or conditions included in the right, and it is redundant to again refer to the terms or conditions of a valid water right.

29. Waste. No comment.

30. Water District. Is a water district an "instrumentality of the State" or is it a political subdivision with established boundaries, established by the Director for the purpose of performing the essential government function of distribution, under state law, of the state's water among appropriators within that district? (It is the distribution that occurs under state law, not the appropriation, such as federal reserved water rights.)

31. Water Management. It appears that the "prior appropriation doctrine" and the "economic development of the water resources of the state" may be inconsistent. It seems that the

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control and regulation of the rights to use of the surface and ground water resources of the state should be provided to obtain full economic development of the water resources of the state, within the principles of the "prior appropriation doctrine."

32. **Watermaster.** No comment.

33. **Water Measurement District.** No comment.

34. **Water Measurement Guidelines.** No comment.

35. **Water Right.** I would change the words "a right based upon federal law" to "a water right reserved under federal law."

36. **Waters of the State or Public Water.** Should be defined as surface or ground water, as herein defined, that has not been appropriated and diverted and retained in private ownership.

RULE 20 - PRINCIPLES FOR WATER MANAGEMENT

01. **Authorized Uses.** No comment.

02. **Unauthorized Use.** No comment.

03. **Regulation of Diversions.** No comment.

04. **Ground Water Management.** No comment.

05. **Surface Water Management.** No comment.

06. **Use of Surface Water First.** No comment.

07. **Reuse and Drainage of Water.** The second sentence of this proposed rule is contrary to the laws of the State of Idaho and should not be adopted in its present form, as there is no legal authority for such a rule. There is no legal basis by which the reuse of drain or waste water (ground water) diverted for drainage must be returned to a source of public water. (Under the definitions provided, ground water is water under the surface.) If the water diverted for drainage is used by the original diverter, it is being returned, in part, to a source of public water, i.e., ground water. In any event, if the water drained is from the irrigation of the land, it is not public water, but private water and a part of the water originally diverted for the irrigation of the land. Under this provision, any water diverted and applied to beneficial use such as irrigation becomes public water once it is applied to the land and sinks into the ground, whether or not it sinks in one inch, one foot, or 300 feet. This is not the law. This section is

also inconsistent with section 42-228, Idaho Code. It is clear under this Idaho law that when water is diverted for drainage purposes to improve or preserve the utility of the land, such water may be used on the project which brought the foreign water to the lands that resulted in a need for drainage. It is also impossible to meet the provisions of this rule, even if it were lawful, as in some instances, the water diverted from a drain cannot be returned to a public water source without application to beneficial use. Evidence exists that establishes that in some instances the application of drain water for irrigation is the best means by which the water can be returned to the source of public water, especially where the original water applied to the land is ground water, and there is no natural drainage to any other public water other than the ground water from which it was diverted.

08. Establishment and use of Response Zones. No comment.

09. Establishment and Use of Presumptive Depletions. It is difficult to understand how a depletion by a junior appropriator, whether actual or presumptive, would not establish "injury" to a senior appropriator who is thus denied the right to divert the depleted portion of the water source. On the other hand, if the depletion in the surface water source caused by the diversion and use of hydraulically connected ground water does not cause injury, why would there be a need to determine a "presumptive depletion"? In the same vein, a presumptive depletion should not be established where the diversion and use of the connected ground water is based upon a senior right.

10. Establishment and Use of Presumptive Injury. It is impossible to understand how the Director or any other person could establish a "presumption of injury" resulting from the diversion and use of surface or ground water under a junior priority water right by looking at only stream flow measurements or measurements of ground water levels. It would be the cause of any reduced stream flow or ground water level that would presume injury by a junior diverter. It is also impossible to understand how the amount of stored water controlled by the holder of a senior priority water right can relate to injury. Stored water has a value, whether or not it is required for use in that particular year, and the reliance upon storage when not otherwise required constitutes injury. It is also unlawful for the Director to establish a presumptive injury by rulemaking, rather than through a due process hearing if sufficient evidence is not otherwise available. Under the presumptive depletion and presumptive injury proposed rules, would a watermaster be prohibited from administering the distribution of water under a priority system if the Director has not made a presumptive depletion or presumptive injury rule? It is also clear that the

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Director has no authority to alter an established water right through his rulemaking authority by reviewing consumptive irrigation and field headgate requirements, actual diversions and other sources of water to establish injury.

11. Notice. No comment.

12. Challenge to Response Zones and Rebuttal of Presumptions. No comment.

13. Use of Mitigation. No comment.

14. Primary Enforcement Through Water Districts. No comment.

RULE 21 - AUTHORIZED AND UNAUTHORIZED DIVERSION AND USE OF WATER

01. Use in Accordance with a Water Right. This rule could be substantially simplified if it referred to the diversion and use of waters of the State.

02. Other Authorized Uses. The Director has no authority to eliminate the right of recapture for reuse provided by Section 42-228, Idaho Code, by referring to only Rule 20.07, which fails to address the full import of Section 42-228, I.C. The rule should recognize that certain ground water is not waters of the State of Idaho, where it is recaptured by the diverter of the water within a project and the water recaptured from the ground is clearly water from project diversions.

03. Unauthorized Diversion and Use of Water. No comment.

RULE 22 - ROTATION AGREEMENTS. No comment.

RULE 23 - WATER QUALITY REMEDIATION AND RESEARCH PROJECTS. No comment.

RULE 24 - DIVERSION OF WATER DURING FLOODING No comment.

RULE 25 - ENFORCEMENT OF THE USE OF WATER RIGHTS FROM SURFACE WATER SOURCES PRIOR TO USING WATER FROM GROUND WATER SOURCES.
No comment.

RULE 30 - ENFORCEMENT MECHANISMS No comment.

RULE 40 - CREATION, MODIFICATION, AND OPERATION OF WATER DISTRICTS

01. Separate Districts. No comment.

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02. Operation of Water Districts.

a. This provision is contrary to state law. A watermaster is elected by the waterusers of the district, who is authorized to employ such other regular assistants as the waterusers shall deem necessary under Section 42-605(3), Idaho Code. If that elected watermaster is appointed by the Director, the watermaster shall be responsible for distribution of water within said water district. If the watermaster is not appointed by the Director, it would appear that the watermaster elected would not be responsible for distribution of water within the water district. If the watermaster is not elected or his compensation is not fixed at the annual meeting of the waterusers, then, the Director is authorized to appoint a watermaster and fix the watermaster's compensation. I can find no provision in the law which allows the Director to set a budget or collect assessments.

b. I can find no authority by which the bylaws of the water district are subject to the approval by the Director.

RULE 41 - GENERAL DUTIES OF WATER DISTRICT WATERMASTERS. No comment.

RULE 42 - ENFORCEMENT DUTIES OF WATER DISTRICT WATERMASTERS. No comment.

RULE 43 - DIVERSION RATE FROM GROUND WATER SOURCES. No comment.

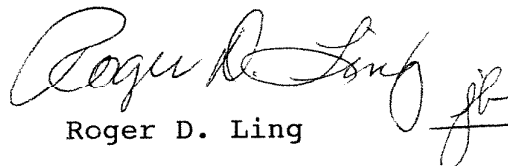
RULE 80 - MEASUREMENT AND ENFORCEMENT OF WATER RIGHTS NOT IN A WATER DISTRICT. No comment.

RULE 90 - MEASUREMENT AND REPORTING OF WATER DIVERSION AND USE. No comment.

RULE 91 - MEASUREMENT AND REPORTING OF GROUND WATER LEVELS. No comment.

RULE 100 - MANAGEMENT OF WATER USES IN CRITICAL GROUND WATER AREAS AND GROUND WATER MANAGEMENT AREAS. No comment.

Very truly yours,



Roger D. Ling

SIGNED IN THE ABSENCE OF
MR. LING TO AVOID DELAY

RDL:jb

BEEMAN & ASSOCIATES, P.C.

Counselors and Attorneys at Law
409 West Jefferson Street
Boise, Idaho 83702-6049

Josephine P. Beeman
jbeeman@micron.net
Deborah E. Nelson
debnelson@micron.net

Telephone
(208) 331-0950
Facsimile
(208) 331-0954

November 15, 2001

Mr. Karl Dreher, Director
Mr. Norm Young, Administrator, Water Management Division
Idaho Department of Water Resources
1301 North Orchard Street
Boise, Idaho 83706

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Department of Water Resources

Re: North Snake Ground Water District's Comments on July 10, 2001, Draft
Statewide Water Management Rules, IDAPA Docket No. 37-0313-9701

Dear Karl and Norm,

We appreciate the opportunity to provide comment on the Department's July 10, 2001, Draft Statewide Water Management Rules on behalf of the North Snake Ground Water District (NSGWD). Many of the comments herein are based on the belief that the two-year collaborative process underway among ground and surface water users pursuant to "safe harbor" agreements in Basins 35 and 36 (and adjacent areas) should inform this rulemaking process. With that purpose in mind, we would encourage IDWR to establish certain fundamental principles in the current water management rulemaking, but to leave the opportunity for the collaborative process and wider policy decisions to help further define these rules over the next two years.

This letter addresses basic legal issues, using the standard for review of a rulemaking under Idaho's Administrative Procedures Act. These general comments are followed by specific comments with suggested language to clarify definitions, create consistent terminology within the rules, and to reference existing statutory hearing procedures applicable to IDWR orders and determinations within the rules.

Hydraulically Connected Ground Water And Surface Water Sources

The term "hydraulically connected" appeared for the first time in Idaho statutes in 2000. The only other reference to "hydraulically connected" in Idaho case law is in the 1982 *Parker v. Wallentine* decision which addresses a well interference case and not the conjunctive management issues addressed by the Draft Water Management Rules.

A review of case law reveals that in other western states, including Arizona and Colorado, the term “hydraulically connected” represents a threshold standard to determine whether rights are subject to administration. “Hydraulically connected” does not determine injury, nor does it presume that injury exists. Rather, this threshold standard simply represents a political or policy decision, albeit a factually-informed decision, as to which ground water users will be subject to administration with surface water users. It is important that this distinction is reflected in IDWR’s water management rules. Hydraulic connection is only the first step. Once that threshold standard is met, then conjunctive administration begins with a fact-based analysis of whether a senior appropriator is injured. Once injury is established, then mitigation options are evaluated.

Case law also demonstrates the important difference between determining injury to a senior appropriator under the prior appropriation doctrine and the allocation of water within the interstate compact context. In the interstate compact context, the allocation of water to a state speaks to the amount of water to which a state is entitled regardless of the manner in which the state uses the water.¹ If the source of water allocated in the interstate compact has “hydraulically connected” ground water, “as a matter of law, [the] compact restricts and allocates as part of the . . . water supply, any ground water that would become part of the stream flow in the basin if not previously depleted through an activity of man such as pumping.”² In other words, the existence of hydraulic connection, as a matter of law, means that the allocated water supply includes any ground water that would become part of the stream flow. Thus, the calculation of “depletions” from ground water is appropriate in the context of an absolute physical allocation of surface water. Such a calculation, however, is not an appropriate basis for determining injury to a senior surface water user.

The Draft Water Management Rules’ reliance on presumptive depletions and presumptive injury to administer “hydraulically connected ground water and surface water sources” might be appropriate in the interstate allocation of water context, but it is not a framework which should guide water management in Idaho. Rather, the Idaho Constitution adopts the prior appropriation doctrine and also seeks to maximize the economic use of the state’s water resources. At the core of these constitutional principles is a recognition that each water user is only entitled the amount of water they can put to reasonable beneficial use. A

¹ See Memorandum from J. R. Ritter to S. O. Harper III (May 21, 1941) cited at page 28 of the First Report of the Special Master, *State of Kansas v. State of Nebraska and State of Colorado*, U.S. S.Ct. No. 126 (Jan. 28, 2000).

² First Report of the Special Master, *State of Kansas v. State of Nebraska and State of Colorado*, U.S. S.Ct. No. 126 (Jan. 28, 2000), at 34.

water user is not entitled to an absolute physical allocation of water. Thus, it is not axiomatic that depletion to a source by a ground water user causes injury to a senior surface water user.

As ground water and surface water users work collaboratively over the next two years, they will be and should be guided by the prior appropriation doctrine and its standards of reasonable use and beneficial use. A beginning analysis that treats a water right under the prior appropriation doctrine as an entitlement or allocation of physical flow is inappropriate and de-emphasizes the prior appropriation doctrine standards of reasonable and beneficial use.

We recommend the Water Management Rules do not include at this time definitions or implementation of "presumptive depletion" or "presumptive injury". We further recommend the Rules include a statement in the definition of "hydraulically connected ground water and surface water sources" to explain that a factual standard or process for determining injury, over and above the standard of hydraulic connection, will be established in the sub-basin components of the rules (e.g., the Eastern Snake Plain Aquifer or the Boise River Basin). Since conjunctive administration under the prior appropriation doctrine is not the allocation of waters within an interstate compact, the State of Idaho and its water users have the opportunity to decide the extent of administration that is appropriate for ground water users, balancing economic and legal considerations.

Response Zones Do Not Account For Priority Date Among Ground Water Users

The response zones have been created as part of a ground water modeling effort which does not include priority date analysis. Such an analysis is important because surface use is not uniformly senior to ground water use. For example, in the Thousand Springs area, large surface water users have priority dates junior to extensive up-gradient ground water development. In addition, many surface water users in the state with pre-1900 water rights have acres with 1994 priority dates due to expansion of their early priority date water rights. Response zones do not serve the prior appropriation doctrine when they are developed and administered without specific priority date information.

Conjunctive Administration Authorities

NSGWD has supported the formation of water districts in Basins 35 and 36 to facilitate interim administration of ground water and surface water users. The mechanisms by which critical ground water areas and ground water management areas are formed do not fit the conjunctive administration paradigm. Both designations have historically been used by IDWR

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as establishing *de facto* moratoriums on the processing of new ground water right permits. Our review of IDWR records indicates that IDWR designated eight critical ground water management areas prior to the passage of the ground water management area statute in 1982. Since that time, nine ground water management areas have been established. Although a few of the ground water management areas have been designated based on depletion of surface water caused by ground water, the primary impact of those designations was to control additional ground water development and gather additional data.

Administration of existing ground water rights to protect senior surface water rights is addressed in Idaho Code 42-237(a)(g), not 42-233a (the critical ground water area statute) or 42-233b (the ground water management area statute). Statutes addressing administration among ground water users are not the appropriate vehicles for conjunctive administration of existing ground water and surface water rights. Importantly, the existing Conjunctive Management Rules in Idaho establish the Eastern Snake Plain Aquifer as a "common area of ground water supply" consistent with the language in 42-237(a)(g). As discussed above, priority dates among ground water users are an important part of conjunctive administration in Idaho because there is no clear divide in priority date between all surface water users and all ground water users. The "common ground water supply" provided for in 42-237(a)(g) contemplates evaluation of all ground water use and priority dates. Since recent extensive ground water level measurements of the Eastern Snake Plain Aquifer indicate that the aquifer is not being mined and that, in general, ground water levels are stable throughout the aquifer, the criteria for establishing a critical ground water area (insufficient ground water to provide a reasonable safe supply for irrigation) or a ground water management area (approaching the conditions of a critical ground water area) are not present. NSGWD recommends Rule 100 be removed on the basis that it exceeds the Director's authority under 42-233a and 42-233b.

We appreciate the opportunity to participate in this negotiated rule-making and look forward to continuing discussions regarding the Statewide Water Management Rules.

Sincerely,

BEEMAN & ASSOCIATES, P.C.

Josephine P. Beeman

Additional Comments by NSGWD on Draft Statewide Water Management Rules

001. TITLE AND SCOPE (RULE 1).

02. Scope. This section should include a statement that the rules do not address water quality issues.

010. DEFINITIONS.

A general comment applicable to the entire definitions section: Where a term has already been defined in existing statutes or rules, the definition of the same term in these rules should either restate the original definition using the exact language, or simply refer to the citation where that term is already defined. To define terms even slightly inconsistently with existing definitions may cause uncertainty, and thus lead to disputes, as to the meaning of certain terms.

02. Conjunctive Administration. Rule 10.31, defining “Water Management” confirms that administration will be done “in a manner consistent with the prior appropriation doctrine and the full economic development of the water resources of the state.” The same language should be included in Rule 10.02’s definition of “Conjunctive Administration.” Suggested changes:

The combined administration of water rights from hydraulically connected surface and ground water sources in a manner consistent with the prior appropriation doctrine and the full economic development of the water resources of the state. ~~under the prior appropriation doctrine as set forth in Idaho law recognizing the priorities of the rights, physical characteristics and significance of source connectedness, and the differences in impacts occurring from surface water diversions versus impacts from ground water diversions.~~

06. Diversion Rate. Rule 42.01.d provides that the rate of diversion “shall be measured at the point of diversion from the public water source or as near as practicable to the diversion as determined by the Director, and not at the field headgate or other place of use unless otherwise provided by the terms of the water right.” This language should be included in Rule 10.06’s definition of “Diversion Rate” to make clear that the diversion measurement occurs at the diversion from the water source and not at just any “point of diversion.” Suggested change:

The volume of water moving past a point in a diversion system the point of diversion from the public water source, or as near as practicable to the

diversion as determined by the Director, during a unit of time, most often stated in cubic feet per second (cfs).

08. Elements. Rule 10.08 does not include all of the water right elements defined in the Idaho Code as appropriate for inclusion in a decree. Specifically, Rule 10.08's list lacks the elements included in Idaho Code sections 42-1411(2)(k) and 42-1411(3). Sections 42-1411(2) and (3) list the water right elements to be included in the Director's Report, and Section 42-1412(6) provides that each of the elements in 42-1411(2) and (3), as applicable, shall then be incorporated into the decree. Rule 10.08 should include the entire list of water right elements defined in the Idaho Code as appropriate for inclusion in a decree, or, alternatively, the rule should simply state:

The elements of a water right include the elements listed in Sections 42-1411(2) and (3), Idaho Code, the source of water, date of priority, the maximum quantity of water that may be diverted, point of diversion, purpose of use, place of use, extent of use, period of use, and conditions on the exercise of the water right included in any decree, license, or approved transfer application.

13. Hydraulically Connected Ground Water and Surface Water. This rule should incorporate a "materiality" standard so that some threshold of interconnection is present before the injury analysis or other administration begins. For example, the state of Colorado has adopted a standard of 1/10 of 1% impact in 100 years to demonstrate "material interconnection." Likewise, the Department's reliance on response zones must be preceded by a material interconnection threshold.

15. Injury. A standard of substantially or materially should be added to this rule. Further, as "umbrella" rules encompassing the existing Conjunctive Management Rules, these rules must be consistent with the Conjunctive Management Rules' provisions relating to injury. Suggested changes:

Injury to a senior priority water right occurs when water diverted under a junior priority water right materially diminishes the amount of water that otherwise would have been: (1) physically and legally available under the senior water right; (2) diverted without waste; and (3) applied without waste to the beneficial use authorized under the senior water right. The extent of injury equals the amount of water diminished. Factors the Director may consider in determining whether injury exists are set forth in Rule 42.01 of the "Rules for

Conjunctive Management of Surface and Ground Water Resources”
(IDAPA 37, Title 03, Chapter 11).

16. In-Kind Mitigation. Suggested change:

Mitigation in the form of replacement water provided by or for the benefit of the holder of a junior priority water right to lessen or prevent injury to a senior priority water right.

17. Mitigation. Again, as “umbrella” rules encompassing the existing Conjunctive Management Rules, these rules must be consistent with the Conjunctive Management Rules’ provisions relating to mitigation. The existing Conjunctive Management Rules provide factors the Director may consider in deciding whether proposed mitigation is “acceptable” to compensate the senior water right holder. Suggested changes:

The result of an action taken by or for the benefit of the holder of a junior priority water right to lessen or prevent injury to a senior priority water right, or to provide compensation acceptable to the holder of to the holder of a senior priority water right for injury caused by the diversion and use of water under the junior priority water right or to comply with the terms and conditions of an approved mitigation plan.

21. Presumptive Depletion. See general comments in cover letter regarding use of presumptive depletion standards. Moreover, the rule is too broad in that it does not include any technical standard by which the Director may determine presumptive depletion, such as commonly accepted engineering practices.

22. Presumptive Injury. See general comments in cover letter regarding use of presumptive injury standards. Moreover, the rule is too broad in that it does not include any technical standard by which the Director may determine presumptive injury, such as commonly accepted engineering practices.

25. Rotation Agreement. The rule states that the rotation agreement will “provide for more efficient use of water” without stating how it would be determined whether rotation is more efficient or not. Indeed, such a determination is especially difficult, if not impossible, in irrigation districts or canal companies which are exempted by Rule 22.02 from providing a written rotation agreement for IDWR review.

29. Waste. The terms “reasonably needed” and “actually beneficially used” should be re-included in the definition. The concept of reasonable use as a basic principle in Idaho law and policy is well described in Rule 20.03 of the Conjunctive Management Rules:

These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

Further, the newly-added provision—“Water for conveyance and application losses included in the total diversion rate and annual diversion volume authorized under a valid water right is not waste unless the losses are not reasonable considering all applicable circumstances, including local or community customs or standards”—should be removed. This statement potentially creates a separate burden of proof to establish waste of conveyance and application water that is unsupported by the common law in terms of what constitutes waste. The first statement of the rule, as redrafted below, adequately defines waste for all uses of water. Finally, the “local or community customs or standards” is not an appropriate measure for determination of waste. Certain water use may be acceptable between neighboring canal companies but should not be the standard when injury is being examined in the context of a call between surface and ground water users. Rather, what constitutes waste should be determined by the customs or standards for the area in which a call operates. Suggested changes:

That amount of water diverted in excess of the amount of water reasonably needed for, and actually put to beneficial use under, a water right. ~~Water for conveyance and application losses included in the total diversion rate and annual diversion volume authorized under a valid water right is not waste unless the losses are not reasonable considering all applicable circumstances, including local or community customs or standards.~~

020. PRINCIPLES FOR WATER MANAGEMENT.

02. Unauthorized Use. The first sentence should be changed as follows:

Unauthorized diversions and uses of water are prohibited.

04. Ground Water Management. Under this draft rule, the director may determine that a ground water use causes injury to a senior priority water right, but there is no indication that a hearing may be held regarding whether the ground water use does in fact cause injury. Under Idaho Code 42-237(e) and 42-1701A, an APA hearing is required upon request. These statutes should be referenced in this rule. Further, the rules need to address the basic steps underlying the principles for water management: (1) determination of injury; and (2) adoption of approved mitigation or curtailment. If IDWR's intention is to address the process that will lead to these determinations in a sub-component of these rules (i.e. in the ESPA or the Boise River Basin), then these rules should state so.

05. Surface Water Management. "Connected surface water sources" needs to be defined. This term and the term "hydraulically connected" are used inconsistently throughout this rule and should be made consistent. Additionally, the first two sentences should be changed as follows:

Rights to use surface water will be managed and administered to lessen or prevent injury to senior priority rights to the use of water from connected surface water sources in accordance with Idaho law.
Rights to use surface water will also be managed and conjunctively administered to lessen or prevent injury to senior priority rights to the use of hydraulically connected ground water in accordance with Idaho law.

06. Use of Surface Water First. Minimizing depletions from and maintaining incidental recharge to a ground water source are not legal bases for determining injury under the prior appropriation doctrine.

09. Establishment and Use of Presumptive Depletions. See general comments in cover letter regarding use of presumptive depletion standards.

10. Establishment and Use of Presumptive Injury. See general comments in cover letter regarding use of presumptive injury standards. Moreover, this rule should acknowledge the statutory provisions in Idaho Code 42-237(e) and 42-1701A which provide for an APA hearing to determine injury.

021. AUTHORIZED AND UNAUTHORIZED DIVERSION AND USE OF WATER.

02. Other Authorized Uses. The following should be added to the list of “Other Authorized Uses”:

- i. Water may be used in accordance with approved mitigation.

03. Unauthorized Diversion and Use of Water. (c.) There is no hearing provided for the formation of a ground water management area and yet a person can be deemed to have an unauthorized diversion because they are in conflict with the designation of a ground water management area. This rule should acknowledge the statutory provisions in Idaho Code 42-237(e) and 42-1701A which provide for an APA hearing.

022. ROTATION AGREEMENTS.

02 . Basis for Use of Water in Excess of Recorded Right. Irrigation districts and canal companies should not be exempted from IDWR review of rotation agreements. IDWR must ensure the agreements actually do not provide for the use of more water than would otherwise be used without the agreements.

025. ENFORCEMENT OF THE USE OF WATER RIGHTS FROM SURFACE WATER SOURCES PRIOR TO USING WATER FROM GROUND WATER SOURCES.

01. Surface Water First. Suggested changes:

Water shall not be diverted and used for irrigation under a ground water right unless the amount of water available for use from a natural flow surface water right for the same irrigation use is physically or legally unavailable in timing, location, or amount under the right, or unless the ground water is diverted and used in accordance with approved mitigation.

02. Surface Water Unavailable. (a.) Suggested change:

For the purposes of this rule, water will be considered to be unavailable under a natural flow surface water right if one (1) or more of the following conditions exist: a. The surface water source does not have a sufficient supply or the supply is physically unavailable to the right holder in timing, location, or amount. b. The natural flow surface

J.R. SIMPLOT COMPANY ONE CAPITAL CENTER 998 MAIN STREET SUITE 1000
P.O. BOX 27 BOISE, IDAHO 83707-0027 (208) 338-2110 FAX (208) 389-7515

CORPORATE HEADQUARTERS

RECEIVED

November 16, 2001

NOV 16 2001

**US PRIORITY MAIL AND
FACSIMILE TRANSMISSION: (208) 327-7866**

Department of Water Resources

Director Karl J. Dreher
Idaho Department of Water Resources
1301 North Orchard St.
Boise, ID 83706

Re: Department's July 10, 2001 Draft Statewide Management Rules "Rules"

Dear Karl:


The J. R. Simplot Company ("Simplot") appreciates the opportunity to provide comment to the Department's July 10, 2001 Draft Statewide Management Rules "Rules". I have attached a redline version incorporating my suggested changes to the Rules. As you know, the water user community is struggling with several ongoing processes that are stretching water user and State resources to the limit, both in time and money. Simplot is concerned that we need to propose strategic timelines consistent with resource limitations.

In addition, we must ensure that the Rules do not create processes that exceed the factual knowledge of the Ground and Surface Water systems. The Rules should provide the basic foundation for Water Management. As our understanding improves through interim administration, case law, and the development of the best available science, the Rules can be amended to reflect these experiences. Hopefully, Simplot's comments reflect the following critical concerns:

- Ensuring that the "Prior Appropriation Doctrine" is not compromised through the Rules.
- The scope of the Rules should provide the "basic" foundation for administration. IDWR may amend the Rules in the future.
- The Rules should not address topics that require legislation to implement.
- The administrative costs and capabilities to implement the Rules need to be carefully evaluated.
- Use pilot projects or other tools to "test drive" proposed changes prior to formally adopting the concepts in the Rules.

Thank you for your consideration of Simplot's suggested changes and comments.

Sincerely,


TERRY T. UHLING
Vice President, Environmental
Health & Safety & Regulatory Affairs
Associate General Counsel

TTU/njv
Enclosure

Bringing Earth's Resources to Life

**THE FOLLOWING IS WORKING DRAFT TEXT FOR NEGOTIATED
RULEMAKING BY THE IDAHO DEPARTMENT OF WATER RESOURCES
IDAPA DOCKET NO. 37-0313-9701**

(July 10, 2001)

IDAPA 37

TITLE 03

Chapter 13

37.03.13 - STATEWIDE WATER MANAGEMENT RULES

000. LEGAL AUTHORITY (RULE 0).

These rules are promulgated pursuant to the Idaho Administrative Procedure Act, Chapter 52, Title 67, Idaho Code, and Section 42-1805, Idaho Code, which provides that the Director of the Idaho Department of Water Resources is authorized to adopt rules to implement the powers and duties of the Department. The powers and duties of the Department include acting on behalf of the State of Idaho to control the appropriation and use of all surface and ground waters within the state in accordance with statutory authority including but not limited to Sections 42-101, 42-220, 42-226, 42-237a.g., and 42-351, Idaho Code, and without regard to whether the waters are located within water districts created pursuant to Section 42-604, Idaho Code. Rules herein relating to water districts are also promulgated pursuant to Section 42-603, Idaho Code, which authorizes the Director to adopt rules for the distribution of water from the streams, rivers, lakes, ground water, and other natural water sources within water districts as necessary to carry out the Idaho law in accordance with the priorities of the rights of the water users. ()

001. TITLE AND SCOPE (RULE 1).

01. Title. These rules may be cited as IDAPA 37.03.13, "Statewide Water Management Rules." ()

02. Scope. The rules are applicable statewide to the use of the waters of the state. The rules provide direction to the Idaho Department of Water Resources and its appointed watermasters in the enforcement of laws prohibiting unauthorized uses of water, administering diversions by priority, governing the use of supplemental water rights, providing standards and procedures for measuring and reporting water diversion and use, and addressing other water delivery issues. Additional rules may be promulgated for a particular administrative basin or water management activity as needed to specifically address unique conditions. ()

002. WRITTEN INTERPRETATIONS (RULE 2).

Written interpretations of these rules, if any, in the form of explanatory comments accompanying the notice of proposed rulemaking, the review of comments submitted in the adoption of these rules, and any declaratory rulings issued subsequent to adoption of these rules are available from the Idaho Department of Water Resources, P. O. Box 83720, Boise, Idaho 83720-0098. ()

003. ADMINISTRATIVE APPEALS (RULE 3).

Challenges to these rules may be filed pursuant to Chapter 52, Title 67, Idaho Code, or actions taken under these rules may be appealed pursuant to Section 42-1701A, Idaho Code. ()

004. IDAHO LAW AND PRIOR APPROPRIATION DOCTRINE (RULE 4).

These rules are intended to further implement and apply Idaho law. Nothing in these rules shall be construed to be inconsistent with or limit the application or requirements of Idaho law, including the prior appropriation doctrine as implemented in Idaho law. ()

005. OTHER AUTHORITIES REMAIN APPLICABLE (RULE 5).

Nothing in these rules shall limit the Director's authority to take alternative or additional actions relating to the management of water resources as provided by Idaho law. ()

006. -- 009. (RESERVED)**010. DEFINITIONS (RULE 10).**

For the purposes of these rules, the following terms are used as defined below. ()

01. Beneficial Use Claim. means as that term is defined in _____. A notice of claim to a water right established through diversion and beneficial use of public water filed in accordance with Section 42-243, Idaho Code, or Section 42-1409(2), Idaho Code, and not established by the permit and license procedure of Chapter 2, Title 42, Idaho Code, or previously decreed by a court of law. () (This should be the exact definition out of the statute.)

02. Conjunctive Administration. The ~~combined~~ administration of water rights from hydraulically connected surface and ground water sources. Conjunctive administration will involve several aspects of a water right, including but not limited to the under the prior appropriation doctrine as set forth in Idaho law recognizing priorities of the rights, physical characteristics and significance of source connectedness, and the differences in impacts occurring from surface water diversions versus impacts from ground water diversions. ()

03. Critical Ground Water Area. As that term is defined in the statute _____. ~~Any ground-water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, designated in accordance with Section 42-233a, Idaho Code.~~ ()

04. Department. The Idaho Department of Water Resources created by Section 42-1701, Idaho Code. ()

05. Director. The Director of the Idaho Department of Water Resources appointed as

provided by Section 42-1801, Idaho Code, or an employee of the Department who has been delegated authority to act for the Director as provided in Section 42-1701, Idaho Code. ()

06. Diversion Rate. The volume of water moving past a point in a diversion system during a unit of time, most often stated in cubic feet per second (cfs). ()

07. Domestic. A water right or water use that is within the limits of Section 42-111, Idaho Code. ()

08. Elements. The elements of a water right include the source of water, date of priority, the maximum quantity of water that may be diverted, point of diversion, purpose of use, place of use, extent of use, period of use, and conditions on the exercise of the water right included in any decree, license, or approved transfer application. () Not necessary.

09. Exchange. A change in the use of water under a surface water right approved in accordance with Section 42-240, Idaho Code. ()

10. Expansion. Any increase in one or more of the elements of a water right that increases the extent of beneficial use defined and authorized under a valid water right. ()

11. Ground Water. Water under the surface of the ground, whatever may be the geological structure in which it is standing or moving, as provided in Section 42-230(a), Idaho Code. ()

12. Ground Water Management Area. Any ground water basin or designated part thereof which the Director has determined may be approaching the conditions of a critical ground water area and designated in accordance with Section 42-233b, Idaho Code. ()

13. ~~Hydraulically Connected Ground Water and Surface Water.~~ A ground water source and a surface water source physically interconnected such that a portion of the ground water can become surface water, or a portion of the surface water can become ground water, and changes in water levels within the ground water source affect the amount of water exchanged between the ground water source and the surface water source. The common ground water supply in an area designated in accordance with Section 42-237a-g, Idaho Code, is deemed to be, and shall be managed as, hydraulically connected ground water. ()

14. Idaho Law. The Idaho constitution, statutes, case law, and administrative rules. ()

15. ~~Injury.~~ Injury to a senior priority water right occurs when water diverted under a junior priority water right diminishes the amount of water that otherwise would have been: (1) physically and legally available under the senior water right; (2) diverted without waste; and (3) applied without waste to the beneficial use authorized under the senior water right. The extent of injury equals the amount of water diminished. ()

I would delete any definition of injury. We should allow this definition to evolve and apply on a case by case basis.

~~16. In-Kind Mitigation.~~ Mitigation in the form of replacement water provided by or for the benefit of the holder of a junior priority water right to prevent injury to a senior priority water right. ~~(-) This is already included in Mitigation. No reason to separately set this out.~~

~~17. Mitigation.~~ The result of an action taken by or for the benefit of the holder of a junior priority water right to ~~minimize or~~ prevent injury to a senior priority water right, or to provide compensation acceptable to the holder of a senior priority water right for injury caused by the ~~diversion and beneficial~~ use of water under the junior priority water right. ()

~~18. Mitigation Plan.~~ A document submitted by or for the benefit of the holder of a junior priority water right and approved by the Director, as provided in Rule 43 of the "Rules for Conjunctive Management of Surface and Ground Water Resources" (IDAPA 37, Title 03, Chapter 11), that identifies actions to provide mitigation. ()

~~19. Person.~~ Any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character. ()

~~20. Power Consumption Coefficient (PCC).~~ A parameter used to estimate the volume of water pumped during a period of time. It is the number of kilowatt hours of electricity required by a system to pump one (1) acre foot of water. ()

~~21. Presumptive Depletion.~~ The quantity of water depleted from a surface water source resulting from the diversion and use of water from a hydraulically connected ground water source or the quantity of water depleted from a ground water source resulting from the diversion and use of water from a hydraulically connected surface water source, as determined by the Director based on any available information which may include simulations from mathematical models. ~~(-) No authority to define.~~

~~22. Presumptive Injury.~~ Injury presumed by the Director to occur to a senior priority water right because of the diversion and use of water under a junior priority water right, as promulgated by rule, or adopted through issuance of an order by the Director as provided in Rule 20 of these rules. ~~(-) No authority to define.~~

~~23. Reasonable Pumping Lift Level.~~ -A limiting ground water level established by the Director pursuant to Sections 42-226 and 42-237a.g., Idaho Code, either generally for an area or aquifer or for individual water rights on a case by case basis, for the purpose of protecting the holders of senior priority ground water rights against unreasonable lowering of ground water levels caused by diversion and use of surface or ground water by the holders of junior priority surface or ground water rights under Idaho law. ~~(-)~~

~~24. Response Zone.~~ An area within which unit depletions or unit recharge of ground

water in the underlying aquifer causes similar responses in a hydraulically connected surface water source, or portions thereof, as determined by the Director based on any available information which may include simulations using mathematical models. (-)

25. Rotation Agreement. A voluntary agreement among water users in a delivery system to provide for a more efficient use of water among the users that allows the water delivered to be used for specific periods of time on different places of use while other places of use under the delivery system do not receive water. The agreement quantifies the amounts of water and times available for use under the water rights of participating water users and converts the amounts and times of use into equivalent quantities and times for exclusive use from the delivery system without regard to the legal place of use or the relative priorities of the rights. Is this already defined and do we need this?

26. Stockwater. A water right or use that meets the requirements of Section 42-1401A, Idaho Code. ()

27. Surface Water. Rivers, streams, lakes, and springs, when flowing above ground in their natural channels as provided in Sections 42-101 and 42-103, Idaho Code. ()

28. Unauthorized Use. Diversion or use of water without a not in conformance with a water right, or in a manner not in conformance with the elements, terms, or conditions of a valid water right, or Idaho law.

29. Waste. That amount of water diverted in excess of the amount of water needed for, and put to beneficial use under, a water right. Water for conveyance and application losses included in the total diversion rate and annual diversion volume authorized under a valid water right is not waste unless the losses are not reasonable considering all applicable circumstances, including local or community customs or standards. (-) No necessity to define. Allow it to continue to develop under Idaho law.

30. Water District. An instrumentality of the State of Idaho established by the Director as provided in Section 42-604, Idaho Code, for the purpose of performing the essential governmental function of distribution of water among appropriators under Idaho law. ()

31. Water Management. The control and regulation of the rights to the use of the surface and ground water resources of the state, under the constitution and laws of the state in a manner consistent with the prior appropriation doctrine and the full economic development of the water resources of the state. Water management includes provisions for the administration of rights to the use of surface water, provisions for the administration of rights to the use of ground water, and provisions for the conjunctive administration of rights to the use of hydraulically connected ground and surface waters, all in accordance with the prior appropriation doctrine as implemented under Idaho law.()

32. Watermaster. The person elected and appointed as provided in Sections 42-605 and 42-801, Idaho Code, to distribute water within a water district. ()

a. When ground water diverted from a Common Ground Water Supply, as designated in accordance with Section 42-237a.g., Idaho Code, is determined by the Director to cause injury to senior priority water rights from hydraulically connected surface water or to senior priority water rights to ground water from the same source, such ground water diversion under a junior priority water right within a water district shall be curtailed by the watermaster, unless approved mitigation is provided in accordance with Rule 20.13 of these rules. () What is the process?

b. ~~When data gathered by the Department or otherwise submitted to the Department show to the satisfaction of the~~ the Director determines that the diversion of ground water under any water right, which is not included in a water district, causes injury to a senior priority surface water right or to a senior priority ground water right, such junior priority diversion shall be curtailed under the provisions of Section 42-237a.g., Idaho Code, unless approved mitigation is provided in accordance with Rule 20.13 of these rules. () What is the process?

05. Surface Water Management. Rights to use surface water will be managed and administered to minimize or prevent injury to senior priority rights to the use of water from connected surface water sources in accordance with Idaho law. Rights to use surface water will also be managed and ~~conjunctively administered to minimize or prevent injury to senior priority rights to the use of hydraulically connected ground water in accordance with Idaho law.~~ ()

a. When the diversion of surface water is determined by the Director to cause injury to senior priority water rights from connected surface water sources or to senior priority water rights from hydraulically connected ground water, such surface water diversion under a junior priority water right within a water district shall be curtailed by the watermaster, unless approved mitigation is provided in accordance with Rule 20.13 of these rules. () What is the process?

b. ~~When data gathered by the Department or otherwise submitted to the Department show to the satisfaction of the~~ Director determines that the diversion of surface water under any water right, which is not included in a water district, causes injury to a senior priority surface water right or to a senior priority ground water right, such junior priority diversion shall be curtailed under the provisions of Section 42-351, Idaho Code, unless approved mitigation is provided in accordance with Rule 20.13 of these rules. () What is the process?

06. Use of Surface Water First. To minimize depletions from a ground water source and to maintain incidental recharge to the ground water source, when water rights exist from both a natural flow surface water source and a ground water source for the same irrigation use, the water rights for surface water shall be used before water rights for ground water to the extent it is available, except as provided in Rule 25 of these rules. The combined rate of diversion and the annual volume diverted from the combined sources shall ~~not exceed the amounts reasonably necessary for the~~ be beneficially used. ()

07. Reuse and Drainage of Water. Water remaining after its use under a water right may be recaptured and reused, prior to such water becoming public water, for the same use authorized by the water right and the reuse shall not be considered to be an expansion of the water right associated with such use. Water may also be diverted for drainage purposes to improve or preserve the utility of land without a water right provided the water diverted is returned to a source of public water without application to beneficial use and provided the drilling of wells therefor shall be subject to the licensing provisions of Section 42-238, Idaho Code. Is this necessary and how does it comply with Idaho law?

08. Establishment and Use of Response Zones. The Director may establish response zones to assist in managing ground water depletions and recharge in any area of the state. The response zones shall encompass recharge sites and the points of diversion and places of use for rights to the use of hydraulically connected ground water. Response zones shall be established through rulemaking or adopted through issuance of an order by the Director. When response zones are adopted through issuance of an order, the Director shall provide notice as set forth in Rule 20.11 of these rules. () Response Zones must be consistent with the prior appropriation doctrine. Can we use pilot projects to "test run" the Response Zone management concept?

~~**09. Establishment and Use of Presumptive Depletions.** The Director may establish presumptive depletions in a surface water source resulting from the diversion and use of hydraulically connected ground water, or in a ground water source resulting from the diversion and use of hydraulically connected surface water. Presumptive depletions are not presumptions of injury but may be used as part of the basis for establishing presumptive injury. Presumptive depletions shall be established through rulemaking or adopted through issuance of an order by the Director. When presumptive depletions are adopted through issuance of an order, the Director shall provide notice as set forth in Rule 20.11 of these rules. () Legislative function.~~

~~**10. Establishment and Use of Presumptive Injury.** The Director may establish a presumption of injury to one or more senior priority water rights resulting from the diversion and use of surface or ground water under a junior priority water right. The presumptive injury may be established based upon some or all of the following: streamflow measurements, measurements of ground water levels, measurements of water discharged from springs, the Department's determination of consumptive irrigation and field headgate requirements, the amount of water actually diverted and put to beneficial use under the senior priority water right, the amount of stored water controlled by the holder of the senior priority water right and available for the beneficial use under the senior priority water right, presumptive depletions, and other information determined by the Director to be pertinent. Presumptive injury shall be established through rulemaking or adopted through issuance of an order by the Director. When presumptions of injury are adopted through issuance of an order, the Director shall provide notice as set forth in Rule 20.11 of these rules. () Legislative function.~~

11. Notice. Upon adoption of response zones, presumptive depletions, or presumptions of injury through issuance of an order, the Director shall publish notice in two consecutive

weekly issues of a newspaper of general circulation in the area of the affected water right holders. Any person holding affected water rights objecting to or contesting the order shall have twenty-eight days from the date of the second newspaper notice to file a petition with the Director initiating a contested case under IDAPA 37, Title 01, Chapter 01, seeking to challenge, modify, amend, or stay the order. ()

12. Challenge to Response Zones and Rebuttal of Presumptions. At any time, a water right holder affected by the Director's adoption of a response zone, ~~presumptive depletion, or presumptive injury,~~ may initiate a contested case through the filing of a petition with the Director under IDAPA 37, Title 01, Chapter 01, seeking to change the response zone ~~or rebut a presumptive depletion or presumptive injury.~~ The petitioner must describe the factual or legal basis for the rebuttal or change sought and provide any representative data or other information that the petitioner believes supports the change or rebuttal. () Is this consistent with the administrative procedures act "APA"? See comment above.

13. Use of Mitigation. The Director will allow ~~the out of priority diversion and beneficial~~ use of surface or ground water that would otherwise cause injury to a senior priority water right when approved mitigation is provided. ~~Approved mitigation must be in kind mitigation, unless other compensation is agreed to by the holder of the senior priority water right.~~ Approved mitigation is provided by implementation of an approved mitigation plan or by implementation of conditions on the exercise of the water right included in any decree, license, or approved transfer application. ()

14. Primary Enforcement Through Water Districts. The Department enforcement of limitations on water ~~diversions and use~~ in accordance with Idaho law will be ~~primarily~~ through the establishment and operation of water districts, including the appointment and supervision of watermasters by the Department. However, such administration shall not preclude an individual water right holder from seeking other enforcement measures provided under Idaho law. ()

021. AUTHORIZED AND UNAUTHORIZED DIVERSION AND USE OF WATER (RULE 21).

01. Use in Accordance with a Water Right. ~~Water diversion and use~~ may occur in accordance with a water right evidenced by a court decree, a license or permit issued by the Department, a beneficial use claim to a right filed in accordance with Section 42-243 or 42-1409, Idaho Code, an enlarged use in accordance with Section 42-1426, Idaho Code, an approved transfer pursuant to Section 42-222, Idaho Code, an accomplished transfer in accordance with Section 42-1425, Idaho Code, an approved exchange pursuant to Section 42-240, Idaho Code, a temporary permit issued in accordance with Section 42-202A, Idaho Code, or a temporary change approved in accordance with Section 42-222A, Idaho Code. ()

02. Other Authorized Uses. ~~Diversion and Beneficial use~~ of water may occur without a recorded water right or not in conformance with a recorded water right under the following circumstances, or as may otherwise be provided by Idaho law: ()

a. Water may be ~~diverted and beneficially~~ used from a ground water source for domestic purposes in accordance with Section 42-227, Idaho Code; ()

b. Livestock may be allowed to drink directly from a surface water source in accordance with Section 42-113, Idaho Code, and from water diverted for other authorized uses; ()

c. Water may be ~~diverted and beneficially~~ used for firefighting purposes from any public water source in accordance with Section 42-201(3), Idaho Code; ()

d. ~~Impoundment of water in a tank, pond, or reservoir having a capacity less than or equal to the volume that can be diverted during a 24 hour period under the diversion rate authorized under one or more water rights may occur as part of the delivery and use of the water without a storage component being included in the description of the right or rights; () Is this consistent with Idaho law ?~~

e. Water may be diverted and used in accordance with a rotation agreement; as described in Rule 22 of these rules; ()

f. Water may be recaptured for reuse as recognized in Rule 20.07 of these rules; ()

g. Water may be ~~diverted-used~~ for water quality remediation and research projects in accordance with Rule 23 of these rules; and ()

h. Water may be diverted to prevent potential loss of life or property damage during a flood emergency in accordance with Rule 24 of these rules. ()

03. Unauthorized Diversion and Use of Water. The following constitute unauthorized diversions and uses of water:

a. Diversion and use not in compliance with Rule 21.01 or Rule 21.02 of these rules; ()

b. Diversion and use of water under a beneficial use claim in a water district when the watermaster is delivering water in accordance with priority of rights; ()

c. Use of water in conflict with any order or designation by the Director of a Ground Water Management Area or a Critical Ground Water Area; ()

d. Diversion and use of water resulting from tampering with or changing any headgate or diversion control structure setting by the watermaster, as determined by the Director; ()

e. Out of priority diversion within a water district under the supervision of a watermaster, a critical ground water area, a ground water management area, or any other area for which the Director or a court of competent jurisdiction has ordered a reduction in diversion in accordance with applicable law, provided the diversion and use is not in accordance with approved mitigation; ()

f. Diversion or use of water under an exchange that has not been approved by the Director; () Do exchanges require Director approval?

g. Water rotation that is not consistent with Rule 22 of these rules; ()

h. Diversion or use of water that the Director has determined constitutes waste, as defined by Rule 10.25 of these rules, and as set forth in an order with opportunity for hearing under Section 1701A, Idaho Code; and ()

i. Use of water under a ground water right when adequate water is available under a natural flow surface water right for the same beneficial use, except as provided in Rule 25 of these rules. ()

022. ROTATION AGREEMENTS (RULE 22). ()

01. Purpose and Form. A rotation agreement is a voluntary agreement among the holders of water rights from a shared water delivery system entered into for the purpose of maximizing the beneficial use of a limited water supply by allowing one or more of the users on the system to divert the total available water supply for a scheduled period of time during which the other users on the system temporarily forego their right to divert water. ~~Because a rotation agreement involves rights to the use of real property, the agreement should be in writing and identify the water rights subject to the agreement, the ownership of the water rights, the schedule of rotation, a procedure for enforcing compliance with the agreement, and a process for opting out of the agreement. ()~~ Why is the Department making requirements for voluntary agreements?

02 . Basis for Use of Water in Excess of Recorded Right. A rotation agreement allows the holder of a water right to use water in excess of the amount authorized under the right on a temporary basis in accordance with the rotation schedule. A copy of the approval shall be submitted to the to the Director or to a watermaster to confirm the basis for a water right holder to use water at a rate in excess of that authorized under the holder's water right. However, if the rotation occurs within an irrigation district or canal company a copy of the rotation agreement is not required, and the rotation of rights to the use of water shall be subject solely to the procedures or limitations applying within the water distribution entity. () Is this consistent with Idaho law?

023. WATER QUALITY REMEDIATION AND RESEARCH PROJECTS (RULE 23).

A water right shall not be required for the purpose of diverting surface or ground water for the ~~sole~~ purpose of removing contaminants or suspended sediments from the water or for the ~~sole~~ purpose of conducting water quality, hydrogeologic or geophysical research, and testing provided the following requirements are satisfied with respect to the remediation or research project: ()

01. The remediation project is conducted pursuant to an order or plan approved by a court of law, the Idaho Department of Environmental Quality, or the U. S. Environmental Protection Agency; and ()

02. The remediation or research project operator enters into a memorandum of understanding with the Department for a fixed period of time describing the remediation project and providing that certain conditions of approval be satisfied, which conditions shall included but not be limited to the following: ()

a. The remediation or research project operator shall obtain any needed drilling permit(s) from the Department as required by Section 42-235, Idaho Code, prior to the construction of any wells; ()

b. The remediation or research project operator shall curtail diversion activity or shall provide appropriate mitigation if the remediation activity injures existing water rights as determined by the Director; ()

c. The remediation or research project operator shall hold the Department harmless from any liability due to the operator's negligent discharge of water; and ()

d. The remediation or research project operator shall submit periodic and final reports to the Director regarding the remediation or research activity upon request of the Department. ()

024. DIVERSION OF WATER DURING FLOODING (RULE 24). A water right shall not be required for the purpose of diverting flood waters from a natural water course during periods of a flood emergency designated by the Director, the Board of County Commissioners, or the Governor, provided a primary reason for diverting the water is to reduce the potential risk to life or property located downstream. Any flood waters diverted in accordance with this provision may incidentally be applied to a recognized beneficial use provided other water rights are not injured thereby. ()

025. ENFORCEMENT OF THE USE OF WATER RIGHTS FROM SURFACE WATER SOURCES PRIOR TO USING WATER FROM GROUND WATER SOURCES (RULE 25). ()

01. Surface Water First. Water shall not be diverted and used for irrigation under a ground water right unless the amount of water available for use from a natural flow surface water right for the same irrigation use is physically or legally unavailable under the right ()

02. Surface Water Unavailable. For the purposes of this rule, water will be considered to be unavailable under a natural flow surface water right if one (1) or more of the following conditions exist: ()

a. The surface water source does not have a sufficient supply or the supply is physically unavailable to the right holder. ()

b. The natural flow surface water right becomes legally unavailable for use prior to the effective date of this rule. ()

c. The facilities necessary for diversion, conveyance, and application of the natural flow surface water right were removed or made permanently inoperable, as determined by the Director, prior to the effective date of this rule and have not been replaced. ()

03. Existing Uses Exempted. This rule shall not be applied to require water users, who prior to the adoption of this rule have initiated a practice of using ground water in preference to surface water, to revert to the use of natural flow surface water unless otherwise required to comply with conditions of the ground water right. ()

026. -- 029. (RESERVED).

~~30. ENFORCEMENT MECHANISMS (RULE 30).~~

~~The Department will implement the principles set forth in these rules, within the resources provided to the Department by the legislature, through the creation and operation of water districts, the creation and operation of water measurement districts, the adoption of management plans for designated critical ground water areas and ground water management areas, through additional rulemaking, or through other administrative actions in accordance with applicable law. ()~~

031. – 039, (RESERVED)

040. CREATION, MODIFICATION, AND OPERATION OF WATER DISTRICTS (RULE 40).

Whenever a court of competent jurisdiction has adjudicated the rights to the use of water from any public stream or other public water supply, or entered an order for the interim administration of water rights pursuant to Section 42-1417, Idaho Code, the Director shall establish or modify a water district as appropriate, pursuant to Section 42-604, Idaho Code, for the purpose of supervising the distribution of water from the public water supply in accordance with the prior appropriation doctrine. Before entering an order creating or modifying a water district, the Director shall provide notice of the proposed action and conduct a hearing thereon in accordance with the notice and hearing requirements of Section 42-604, Idaho Code. Each water district created by the Director shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distributing water among appropriators under Idaho law. ()

01. Separate Districts. The Director shall divide the state into water districts in such a manner that each public stream and its tributaries, or other source of water supply, shall constitute a water district, provided: ()

a. Any stream or water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles, may be divided into two (2) or more water districts; ()

b. Any stream or water supply tributary to another stream or water supply may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water from the main stream or other water supply; ()

c. Any stream or water supply may be divided into two (2) or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream or water supply by appropriators in one district does not affect or conflict with the use of the waters of such stream or water supply by appropriators outside such district; ()

d. The Director in creating or modifying a water district may organize the district into two (2) or more divisions or subdistricts based upon hydrologic, geographic, or other considerations, if the Director determines that such organization will result in a more efficient administration of the rights to the use of water from the stream or other source of water supply; ()

e. The Director may create, revise the boundaries of, or abolish a water district or

combine two (2) or more water districts or subdistricts by entry of an order if such action is required in order to properly administer uses of the water resource; ()

f. The Director shall cause copies of any order issued under this rule to be served by regular mail upon all holders of rights to the use of water affected by the order. ()

02. Operation of Water Districts. ()

a. The holders of water rights within a water district shall meet annually in accordance with law to elect a watermaster, set a budget adequate to carry out the responsibilities of the district, and provide for its collection. The Director will appoint a watermaster, set a budget, and provide for its collection if the holders of rights in the district fail or refuse to do so. ()

b. The holders of water rights within each water district shall adopt and submit for approval of the Director bylaws providing for the operation of the district in accordance with law. The bylaws shall provide procedures for calling and conducting annual and special meetings, setting budgets, determining assessments, collecting the assessments, disbursing district funds, financial accounting procedures, duties and responsibilities of the watermaster, and other district officials including an advisory board, and procedures for filing budgets, reports, audits, and other information with the Department. ()

041. GENERAL DUTIES OF WATER DISTRICT WATERMASTERS (RULE 41).

Under the supervision of the Director, a watermaster when duly elected and appointed shall perform the following duties: ()

01. Distribution of Water Supplies. Distribute water by priority of right, taking into account the provisions of approved mitigation, during times of scarcity as directed by the Department. ()

02. Monitoring of Water Diversion and Use. Monitor diversion and use of water from public water sources throughout the year as directed by the Department. ()

03. Regulation of Diversions. Adjust, lock, and post headgates and other diversions as necessary to prevent unauthorized diversion and use of water, including stored and commingled water. ()

04. Record Keeping. Measure and record in daily record books the rate of flow diverted under each right at each point of diversion in the water district. ()

05. Natural Flow and Stored Water Diversions. Determine and record in the district records in a form approved by the Department the amount of natural flow by water right and stored water taken by each water user at each point of diversion in the district. ()

06. Stored Water and Commingled Water. Convey stored water or commingled water from the point it is injected into the natural stream to the diversion points of those entitled to its use, as directed by the Department. ()

07. Annual Report. Prepare and submit an annual report in a form approved by the Department of the diversions of natural flow water or ground water under each right and the volume of stored water taken by each water user at each point of diversion. ()

08. Proposed Budget and Annual Work Plan. Prepare and submit the proposed budget for the next year in accordance with Section 42-615, Idaho Code. The budget shall include a work plan for the upcoming year for approval by the Department. ()

09. Ownership Changes. Advise the Department of changes of ownership of water rights and refuse delivery of water under the right until the change is properly recorded with the Department. ()

10. Documentation. Monitor the availability of water in the public water sources within the Water District and maintain documentation that the available water supplies have been distributed by priority of right. ()

11. Ground Water Levels. Monitor ground water levels in the water district as directed by the Department. ()

12. Inventory of Diversions. Inventory all diversions from public water sources within the water district and notify the Department of any changes. ()

13. Other Duties. Perform other duties, as instructed by the Director, that are necessary to monitor, inventory, and regulate public water supplies within the district and to document that public water supplies available within the district have been diverted and used under the rights thereto in accordance with applicable Idaho law and these rules. ()

**042. ENFORCEMENT DUTIES OF WATER DISTRICT WATERMASTERS
(RULE 42).**

Under the supervision of the Director, a watermaster shall perform the following enforcement duties: ()

01. Enforcement of Diversion Rate and Volume.

a. Diversion and use of water shall not exceed the diversion rate and annual diversion volume authorized under the water right. ()

b. The rate of diversion from surface water sources shall be based upon a twenty-four (24) hour average, provided that the instantaneous rate of diversion shall not exceed the authorized rate if the use of any other water right is injured. ()

c. The rate of diversion from ground water sources shall be based upon a seven (7) day average, except as provided in Rule 43 of these rules, provided that the instantaneous rate of diversion shall not exceed the authorized rate if the use of any other water right is injured. ()

d. The rate of diversion authorized by the water right shall be measured at the point of diversion from the public water source or as near as practicable to the diversion as determined by the Director, and not at the field headgate or other place of use unless otherwise provided by the terms of the water right. ()

02. Enforcement of Priority. Junior priority water rights shall be curtailed in order of priority from the most recent priority date whenever such regulation is found necessary to fill a senior, unsubordinated water right, unless continued out-of-priority diversion is allowed under approved mitigation. ()

03. Enforcement of Point of Diversion. Diversion of water shall occur only at the point or points authorized by the water right; provided however, diversion from a point other than the point or points authorized by the water right will not be prohibited if the following conditions are satisfied: (1) the point of diversion is claimed on an accomplished transfer made in accordance with Section 42-1425, Idaho Code; and (2) there is no information available to show that the claimed point of diversion is erroneous, that such use will cause injury to or has injured other water rights, or that it constitutes an expansion of the water right. ()

04. Enforcement of Place of Use. Use of water shall occur only at the place of use authorized by a water right except as otherwise provided under this rule. ()

a. Use of water at a place other than the place of use authorized by a water right will not be regulated to prevent such use if: ()

i. The new place of use is claimed as an accomplished transfer made in accordance with Section 42-1425, Idaho Code, and there is no information to show that the claimed place of use is erroneous, that the change will cause injury to or has injured other water rights, or is an expansion of the water right; ()

ii. The water right is the subject of a valid rotation agreement; or ()

iii. The water right is the subject of a valid exchange approved by the Director. ()

b. Measurement Accuracy. In determining whether an expansion in place of use has occurred, the Department will consider the accuracy and precision of acreage measurements. Generally, an expansion in acreage under a right will not be considered as having occurred if the acreage found to be irrigated does not exceed the authorized amount by more than five percent (5 percent) for any forty (40) acre subdivision or government lot, unless irrigation has been expanded to include parcels not previously irrigated under the right. ()

05. Enforcement of Period of Use. The period of use for a water right is the period described by the water right within which water may be diverted for the authorized uses or the period ordered by the Director if the water right does not describe a period of use. Diversion and use of water under the right shall occur only during the authorized period of use. ()

06. Criteria for Enforcement of Nature of Use. A wateruser shall not use a water right for a use that is not authorized by the right; provided however, water diverted for any authorized purpose may be incidentally used for stockwater purposes, and water under any water right may be used for firefighting purposes, as provided in Section 42-201(3), Idaho Code. ()

43. DIVERSION RATE FROM GROUND WATER SOURCES (RULE 43).

01. When Totalizing Flow Meter Required. The rate of diversion under a water right for the use of ground water shall be measured using a totalizing flow meter installed and maintained to measure flow rates within ten (10) percent of independent field measurements conducted periodically using calibrated test equipment. A request to use an alternate method of measurement, including use of the power consumption coefficient (or PCC) method, may be submitted by the holder of a ground water right or on behalf of the holder of such right as provided in Rule 90.03 of these rules. However, when ground water is diverted using a pump driven by means of internal combustion or as part of either a compound system or a complex system, the requirement to install and maintain a totalizing flow meter will not be waived unless the requirements set forth in Rule 43.03 are satisfied. A compound system, as the term is used in this rule, means a system where one or more electrical devices are operated from the same electrical power meter connected to the pump used to divert ground water under the right. A complex system, as the term is used in this rule, means any system where the total dynamic head at the pump used to divert ground water under the right varies due to multiple discharge locations in a pipeline, or where the method of delivery will vary between open discharge, gated pipe, or sprinkler system during a single irrigation season, or where multiple wells discharge into a common pipeline. ()

02. Monthly Average Diversion Rate Allowed. Measurement, reporting, and enforcement of the diversion rate under a water right to divert and use ground water will be based on diversions averaged over a period of seven (7) days, unless the waiver condition set forth in Rule 43.03 is satisfied. When this waiver condition is satisfied, the measurement, reporting, and enforcement of the diversion rate under a water right to divert and use ground water may be based on diversions averaged over a period of thirty (30) days, provided that the instantaneous rate of diversion shall not exceed the authorized rate if the use of any other water right is injured. ()

03. Waiver Condition. When use of the PCC method under the conditions of minimum discharge pressure (maximum yield) for any system configuration of ground water diversion, delivery, and application under a water right demonstrates that ground water can not physically be diverted using the system at a rate in excess of the diversion rate authorized under the water right, the requirements of these rules subject to this waiver condition will be modified as set forth in these rules. Continuance of this waiver condition is subject to confirmation annually by the holder of a ground water right or on behalf of the holder of such right that the inability to divert ground water at a rate in excess of the authorized diversion rate remains intact. ()

044. -- 079. (RESERVED).

080. MEASUREMENT AND ENFORCEMENT OF WATER RIGHTS NOT IN A WATER DISTRICT (RULE 80).

01. Measurement and Reporting. Measurement and reporting of the diversion and

use of water under water rights not within a water district is required in accordance with Rule 90.02 of these rules. ()

02. Enforcement Outside of Water Districts. ()

a. If the Director finds, on the basis of available information, that a person is diverting water or has diverted water from a natural watercourse or from a ground water source without having obtained a water right to do so or is applying water or has applied water not in conformance with the elements of a water right, then the Director shall take appropriate action against such person to prevent continued unauthorized use. ()

b. The Director will issue a Notice of Violation (NOV) to a person who is diverting public water without a water right, is applying water or has applied water not in conformance with the elements of a water right, or is otherwise making an unauthorized use of water as described in these rules. ()

c. As appropriate, the Director will file an action seeking injunctive relief or commence an administrative enforcement action in accordance with Section 42-1701B, Idaho Code. ()

d. As appropriate, the Director will seek criminal enforcement in accordance with the provisions of Chapter 43, Title 18, Idaho Code. ()

081. – 089. (RESERVED).

090. MEASUREMENT AND REPORTING OF WATER DIVERSION AND USE (RULE 90).

01. Measurement and Reporting Procedures. Unless a written waiver is received from the Director, the holder of a right to divert water meeting one (1) of the circumstances described in Rule 90.02 below shall install, calibrate, and maintain a suitable measuring device in a manner approved by the Director. The holder of the water right, or a water district or water measurement district on behalf of the holder of the water right, shall measure and report water diversion and use to the Department in a manner approved by the Director. The Department shall publish approved measurement procedures in the water measurement guidelines as defined in Rule 10.34 of these rules.

02. Diversions Subject to Measurement and Reporting. Any diversion subject to one (1) of the following circumstances shall be measured and reported as required by Rule 90.01 of these rules. ()

a. A diversion located within a water district or a water measurement district, unless the diversion is used solely for domestic or stockwater purposes. ()

b. A diversion required to be measured by an order issued under Section 42-701, Idaho Code. ()

c. A diversion required to be measured by a condition of a permit, license, transfer, exchange, or other approval or order of the Director. ()

03. Alternative Methods. Where the installation and maintenance of a measuring device would be unnecessarily burdensome for the holder of a water right, except as required by Rule 43 of these rules, the Director may allow another method as requested in writing by the holder or on behalf of the holder of the water right and approved by the

Director to estimate the amount of water diverted. For ground water diversions, the Director will allow use of the power consumption coefficient (or PCC) method, except as required in Rule 43 of these rules and subject to the following accuracy requirement. Use of any alternate method shall be in a manner approved by the Director, and the approval for the use of an alternate method may be revoked if the Director determines that the alternate method does not provide a sufficiently accurate estimate of the amount of water diverted. For the purpose of this rule, a sufficiently accurate estimate of the amount of water diverted shall be within ten (10) percent of an independent field measurement made using calibrated test equipment. ()

091. MEASUREMENT AND REPORTING OF GROUND WATER LEVELS (RULE 91).

01. Measurement and Reporting Procedures. The depth to ground water shall be reported at each well from which water is authorized to be diverted in accordance with an order issued pursuant to Section 42-701, Idaho Code, or in accordance with a measurement plan submitted by a water district or water measurement district and approved by the Director. The Department shall publish approved measurement procedures in the water measurement guidelines as defined in Rule 10.34 of these rules. ()

02. Measurements by Right Holder. The holder of a water right required to report pursuant to an order issued under Section 42-701, Idaho Code, or Rule 91.01 of these rules, shall measure and report in a manner approved by the Director. ()

03. Measurement by Districts. A water district or water measurement district shall measure and report the depth to water in a network of wells in a measurement plan approved by the Director. ()

092. -- 099. (RESERVED).

100. MANAGEMENT OF WATER USES IN CRITICAL GROUND WATER AREAS AND GROUND WATER MANAGEMENT AREAS (RULE 100).

01. Management Plan. When information is available for the Director to determine that the use of water in a critical ground water area or a ground water management area exceeds the average rate of future natural recharge, that one or more holders of ground water rights are having to pump from a level that exceeds the reasonable pumping lift level for the area, or that senior priority surface water rights are being deprived of water to which they are entitled, the director will enter an order providing a management plan to balance water use with supply and to protect senior priority rights. ()

02. Notice of Management Plan. Notice of the management plan shall be given in the same manner as notice for the designation of a Critical Ground Water Area in Section 42-233a or for the designation of a Ground Water Management Area in Section 42-233b, Idaho Code. Any person objecting to the order adopting the plan is entitled to a hearing and judicial review in accordance with Section 42-1701A, Idaho Code. ()

101. -- 999. (RESERVED).



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Idaho Department of Water Resources

LAW OFFICES
277 North 6th Street, Suite 200
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300
WEBSITE: www.givenspursley.com

Gary G. Allen
Christopher J. Beeson
Michael C. Creamer
Emily MacMaster Durkee*
Thomas E. Dvorak
Roy Lewis Eiguren
Timothy P. Feamside
Jeffrey C. Fereday
Amanda L. Keating
Karl T. Klein
Debora K. Kristensen
Anne C. Kunkel
Franklin G. Lee

David R. Lombardi
D. David Lorello, Jr.
Kevin T. Maloney
Kimberly D. Maloney
John M. Marshall
Kenneth R. McClure
Kelly Greene McConnell
Cynthia A. Mellillo
Christopher H. Meyer
Kendall L. Miller
L. Edward Miller
Patrick J. Miller
Judson B. Montgomery

Angela K. Nelson
W. Hugh O'HJordan
Kenneth L. Pursley
Brad V. Sneed
Virginia L. Stukel
Conley E. Ward
Robert B. White

Raymond D. Givens
James A. McClure
Stephanie C. Westermeier
OF COUNSEL
*Licensed in California only

November 8, 2001

Mr. Karl J. Dreher
Director
Idaho Department of Water Resources
1301 North Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Idaho Ground Water Appropriators Comments on Draft Water Management Rules
Our File No. 3915-40

Dear Karl:

This letter contains Idaho Ground Water Appropriators, Inc.'s ("IGWA") further comments concerning the Department's draft statewide Water Management Rules ("Draft Rules"). While the Draft Rules have "filled out" considerably since the Department's January 24, 2001 draft was circulated for public comment, much remains to be considered and addressed. In particular, the Draft Rules currently contemplate that they will be implemented primarily by the Department issuing orders imposing significant substantive obligations on water users. But they provide little guidance about what process will support or justify such orders. Some of the proposed rules raise more questions than they answer.

General Comments

IGWA remains seriously concerned about the apparent abandonment of the well-considered process contained in the existing Conjunctive Management Rules in favor of a top-down, Department-initiated process. IGWA is opposed to any approach to conjunctive management that does not involve a rigorous factual review of the interrelationships between surface and ground water sources, and of the actual nature and extent of the effects of ground water withdrawals on surface water supplies. This review must occur before any presumptions can be made about depletive effects of ground water pumping or about whether injury to senior water rights is occurring. Also of concern is the fact that the Draft Rules, the Department's

recent actions designating GWMA's, and the current conjunctive management discussion, appears to have skipped over important policy considerations.

For example, rather than looking at how to manage the entire interconnected water resource to meet Idaho's current and future water needs and thereby implement "full economic development of the water resources of the state," the Draft Rules would lock water users into increasing reliance on a chronically limited and uncertain surface water supply, and remove incentives and opportunities to use or further develop the state's prolific ground water supply. All but the uppermost portions of the Eastern Snake Plain Aquifer ("ESPA") are at risk of becoming a de facto wilderness area under the Department's current approach. As the Department knows, even if one hundred percent of any identified effects of ground water pumping were accounted for by approved, operating mitigation plans, surface water users still will remain subject to drought-induced shortages. Yet the several hundred of million acre-feet of water in the ESPA are slated to be placed off limits to future appropriation and beneficial use, including, presumably, use as an emergency supplemental supply by surface water users.

This approach appears to be driven by the single goal of maintaining the ESPA at an artificially high level. But it perpetuates drought's adverse, cyclic effects on surface water users, and now visits them on ground water users as well. The Draft Rules should not congeal as law without any serious discussion of how they foster the policy of full economic development of our water resources in a way that minimizes the adverse impact of drought on all Idaho water users and our economy.

Specific Comments

1. The Draft Rules continue to use the term "expansion," rather than "enlargement" to describe an increase in the beneficial use under a water right. See Rule 10.10. In contrast, Idaho Code sections 42-222 and 42-1426 use the word "enlargement." So do the several Idaho Supreme Court opinions addressing the subject. The closest Idaho law currently comes to defining an "expansion" is in Idaho Code 42-1416B. But that definition is different from the definition in the Draft Rules. Also, by its terms, the definition in 42-1416B applies only for purposes of that section, which governs claims to "expanded use" in a critical ground water area. The term used in the Draft Rules should be "enlargement" or the definition should make it clear that "expansion" for purposes of the water management rules is synonymous with "enlargement."
2. The definition of "hydraulically connected ground water and surface water" at Rule 10.13 also should include the situation where "changes in water levels in the surface water source affect the amount of water exchanged with the ground water source."

3. In previous rulemaking sessions, you indicated that use of the term “injury” in the water management rules was not intended to be inconsistent with use of the term “material injury” in the Conjunctive Management Rules. I.e., there is no “injury” unless the adverse effect is “material.” Absent a specific statement to that effect in these rules, it easily could (and almost certainly will) be argued that a different standard is intended under the different rule sets. As written, without a cross-reference to the Conjunctive Management Rules or a statement that injury contemplates materiality, the draft rules are ambiguous and will only breed future disagreement. Use of the term “material injury” is the most direct way to deal with the problem.
4. The definitions of “Presumptive Depletion” and “Presumptive Injury” are inconsistent to the extent that injury is to be presumed through the mechanism of a rule or order, but depletion is not. Also a depletion is presumed on the basis of “any [reliable, currently available?] information” including computer models, but injury is not. If there is a reason for these differences, they should be explained. If there is no reason for different language, the basis for establishing a presumption should be consistent. The same holds true for the language concerning mechanisms and standards for establishment of Response Zones in Rule 10.24.

In any event, presumptions must be based on substantial, reliable information—information that at least makes what is being presumed more likely to be true than not. There should be a process in which affected parties are involved and the Department determines whether substantial, reliable information exists to meet this standard. Because of the effect these presumptions will have on vested rights, that process should be invoked in a timely way (i.e., involve water users early in the process). The recent experience with the Department’s GWMA designation order, which was issued without prior discussions with water users, and which imposed an almost impossible deadline for water users to obtain meaningful review bears this out.

5. A “Rotation Agreement” is a private agreement, enforceable only by and against parties. The rules should clarify that non-party water users and the Department are not bound or affected by a rotation agreement.
6. The Department should review the use of the words “will,” “shall” and “may” in Rules 20 and 25 to ensure that they do not improperly restrict or expand the agency’s enforcement discretion.

7. In Rules 20.04 and .05, there again is an inconsistency that should be explained or eliminated. As drafted, where management of ground or surface water is under a water district, curtailment of a junior water right to fill an injured senior surface water right would occur after injury is "determined by the Director." For rights outside a water district curtailment would occur "when data gathered by the Department or otherwise submitted to the Department show [injury] to the satisfaction of the Director. . . ." If there is a reason for different language in these two situations, it should be explained. A reason for the difference is not apparent. In either case, the language begs the following questions: What process is to be used to get at the injury question? Is that process different from the process to be used to determine presumptive injury?
8. Rules 20.06 and .07 raise obvious questions about enlargements. What happens when a surface water right and ground water right are, at least on paper, appurtenant to the same ground, but water under the surface water right has not been diverted or beneficially used on the ground for five years, or twenty-five years? What if the surface water also has not been used on other ground? What if it has? What if the surface water that used to have a "home" on those acres has for many years continued to be diverted from the river, run through the delivery system, and spilled back to the river as waste water? Can that surface water use lawfully be resumed on the original ground? If so, how will the unavoidable effects on junior intervening rights in the surface water source be addressed?

Where a water right is to be reused and the initiation of reuse increases the historical consumptive use, how are other right holders protected. Who, if anyone, is then responsible for "making up" the loss to the common water supply? Junior water users? Junior ground water users? Especially where a "reuse" might be proposed to be accomplished by pumping shallow ground water, the rules should make clear how it will be determined that the water has not already become part of the public water supply.

These rules, and the questions they raise about enlargement would benefit from the addition of a qualification that they apply only when the priority use of surface water over ground water, or the reuse, would not "injure water rights existing on the date" of the priority use of surface water or initiation of reuse.

9. If the Department intends the end result of implementing Rules 20.08, .09 and .10 will be a final order that will be implemented by a watermaster in day-to-day administration, then there logically should be one process by which the evidence needed to support findings and conclusions on each component can be produced and evaluated. IGWA outlined what it believes would be the most efficient

process in its March 7, 2001 written comments. The key components of this process are:

- Timely notice to persons in affected basins/river reaches;
 - Opportunity to produce and rebut evidence in a formal or informal proceeding;
 - Defined reaches/zones based on a reasonable threshold level of interrelationship;
 - Final determinations based on substantial, reliable information;
 - Conclusive effect of the outcome absent a showing of excusable mistake or inadvertence, or the existence of new information.
10. The Draft Rules talk about “approved mitigation” and they cross-reference to the criteria in the Conjunctive Management Rules for evaluating proposed mitigation, but they do not indicate how or when a mitigation plan should be “teed up” for consideration and approval. Logically, a mitigation plan should be as contemporaneous as possible with any final determination of “presumptive injury.” Any final order involving presumptive depletions and/or presumptive injury ought to include approval (or disapprovals) of mitigation plans proposed to address identified injury. The process for mitigation plan approval should have the same timing and characteristics described in item 9 above.
11. The Department should discuss with participants in the next rulemaking meeting what should become of a surface water right that is appurtenant to lands currently irrigated with ground water and from which the surface water diversion and conveyance systems have been made permanently inoperable. If someone elects to come under the exemption that Rule 25.02.c provides from the “surface water first” requirement, there should be some accounting for the surface water right that is not, and no longer will be, beneficially used on the land.
12. Because designation of response zones and subsequent administration should be based on a reasonable “threshold” level of interrelationship between the surface and ground water, Rule 40.01.b and c should provide that a stream or water supply may be divided into separate water districts “where the use of the waters. . . in one district does not appreciably affect or conflict with the use of the waters [in another].”
13. Rule 41.09 directs the watermaster to refuse to deliver water under a water right that has passed to a new owner until a change of ownership is properly “recorded” with the Department. Given the backlog in the Department’s processing of Notices of Change of Water Right Ownership, the watermaster should refuse to

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deliver water under the water right only until the Notice has been "filed" with the Department.

14. Rules 42.01.a and b should include an additional qualification that the historical annual diversion volume will not be exceeded.
15. Rule 42.02 should clarify that a junior priority water right will be curtailed in order of priority whenever, and only to the extent, necessary to prevent injury to a senior, unsubordinated water right, unless the junior is operating under an approved mitigation plan.

IGWA appreciates the opportunity to provide these additional comments on the Department's Draft Water Management Rules.

Sincerely,



Michael C. Creamer

cc: IGWA Board
Lynn Tominaga
Mike McIntyre

MCC:kdt

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water right becomes legally unavailable for use prior to the effective date of this rule.

(b.) Is the effective date of this rule the temporary rule date or the final rule date?

041. GENERAL DUTIES OF WATER DISTRICT WATERMASTERS (RULE 41).

The following should be added to the list of a watermaster's duties:

01. Administration of approved mitigation. Administer water in accordance with approved mitigation.

042. ENFORCEMENT DUTIES OF WATER DISTRICT WATERMASTERS.

01. Enforcement of Diversion Rate and Volume. (c.) A seven-day average may not be technically-feasible for accurate ground water measurements.

02. Enforcement of Priority. Suggested change:

Junior priority water rights shall be curtailed in order of priority from the most recent priority date whenever such regulation is found necessary to lessen or prevent injury to ~~fill~~ a senior, unsubordinated water right, unless continued out-of-priority diversion is allowed under approved mitigation.

43. DIVERSION RATE FROM GROUND WATER SOURCES.

01. When Totalizing Flow Meter Required. The timeframe by which "independent field measurements" must be conducted should be defined to state how often the flow meters will be calibrated; "periodically" is too vague. Such measurements should be conducted every 2-4 years unless obvious problems occur with the meter.